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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 357. 77

CHARLES S. HINCHMAN, PLAINTIFF IN ERROR,

vs.

RUFUS P. LINCOLN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 9, 1884.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Rufus P. Lincoln, plaintiff, and Charles S. Hinchman, defendant, a manifest error hath happened, to the great damage of the said Charles S. Hinchman, as is said, and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed July 11th, 1884.

WM. J. WALLACE.

2 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to one hundred and forty, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Charles S. Hinchman, plaintiff in error, against Rufus P. Lincoln, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 19th day of August, in

the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

[Endorsed:] Supreme Court of the United States. Rufus P. Lincoln *vs.* Charles S. Hinchman. Writ of error. Theodore F. H. Meyer, att'y for pl'ff in error, 47 William St., N. Y. city. Due service this day of a copy of within writ of error is hereby admitted. Dated New York, July 15th, 1884. Beach & Brown, pl'ff's att'ys.

[Stamped:] U. S. circuit court, July 15, 1884. Timothy Griffith, clerk.

3 Circuit Court of the United States, Southern District of New York.

RUFUS P. LINCOLN *ag'st* CHARLES S. HINCHMAN.

The clerk of the circuit court of the United States for the southern district of New York will please issue a summons in the above-entitled action.

BEACH & BROWN,
Pl'ff's Att'ys.

(Endorsed:) U. S. C. C., S. D. N. Y. Lincoln *v.* Hinchman. *Præcipe.* U. S. circuit court. Filed Nov. 25, 1882. Joseph M. Deuel, clerk.

4 United States Circuit Court for the Southern District of New York.

RUFUS P. LINCOLN *against* CHARLES S. HINCHMAN.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, this 25th day of November, in the year one thousand eight hundred and eighty-two.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

BEACH AND BROWN,
Plaintiff's Attorneys.

Office and post-office address, 120 Broadway, New York city.

(Endorsed:) United States circuit court, southern district
5 of New York. Rufus P. Lincoln *vs.* Charles S. Hinchman. Summons & notice. Beach & Brown, plaintiff's attorneys.

To the defendant within named: Take notice that upon default judgment will be taken for the sum of eighteen thousand dollars in money, with interest from the eighth day of July, 1882, besides costs. Beach & Brown, plaintiff's attorneys, 120 Broadway, New York city. United States of America, southern district of New York, *ss:* I hereby certify that on the 25th day of November, 1882, at New York, I personally served the within summons on the within-named defendant, Charles S. Hinchman, by showing him the same and delivering to and leaving with him a true copy thereof. Henry E. Knox, U. S. marshal, by G. J., deputy. I hereby depute G. Jeffreys to execute the within summons. Henry E. Knox, U. S. marshal. N. Y., Nov. 25th, 1882. U. S. circuit court. Filed Nov. 29, 1882. Joseph M. Deuel, clerk.

6 United States Circuit Court, Southern District of New York.

RUFUS P. LINCOLN *against* CHARLES S. HINCHMAN.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Rufus P. Lincoln, being duly sworn, doth depose and say that he is the plaintiff in the above-entitled action.

That a cause of action exists in favor of the above-named plaintiff against the above-named defendant, Charles S. Hinchman, to recover a sum of money only, to wit, eighteen thousand dollars and interest from July 8th, 1882, as damages for a breach of the contract hereinafter stated, and arising upon the following facts:

That on or about the 8th day of July, 1882, this plaintiff owned and possessed certain rights in and to certain securities, stocks, and bonds, more particularly set forth in the complaint hereto annexed, and on that day, at the city of New York, this plaintiff sold and delivered to the said defendant and the said defendant purchased of and from this plaintiff his (plaintiff's) rights and position with reference to the said securities, and agreed to pay him therefor the sum of eighteen thousand dollars.

7 That this deponent is justly entitled to recover therefor from the said defendant the sum of eighteen thousand dollars and interest from July 8th, 1882, over and above all counter-claims, discounts, and set-offs known to the plaintiff.

That the above-entitled action is brought for said cause, and the summons therein with notice has been issued to the United States marshal for the southern district of New York, a copy of which summons and notice is hereto annexed, and the said action has been actually commenced by personal service of the said summons and notice upon the defendant, Charles S. Hinchman, on the 25th day of November, 1882, at the city of New York, within said district, by the said marshal, as appears by his certificate of such service endorsed upon the original summons on file herein, a copy of which certificate is endorsed upon said copy summons.

That the said defendant, Charles S. Hinchman, is not a resident of the State of New York, but resides in the city of Philadelphia, in the State of Pennsylvania.

That no previous application for an attachment has been made herein, except an application on or about the 27th day of November, 1882, to Hon. William J. Wallace, circuit judge, which was not granted because the affidavit on which the application was made did not show affirmatively that the action had been actually commenced.

RUFUS P. LINCOLN.

Sworn to before me this 1st day of December, 1882.
[SEAL.] HENRY FITZ RANDOLPH,
Notary Public (133) *N. Y. Co.*

8 (Endorsed:) United States circuit court, southern district of New York. Rufus P. Lincoln *vs.* Charles S. Hinchman. Affidavit for attachment. Beach & Brown, attorneys for plaintiff, 120 Broadway, N. Y.

9 Circuit Court of the United States, Southern District of New York.

RUFUS P. LINCOLN *against* CHARLES S. HINCHMAN.

Rufus P. Lincoln, the above-named plaintiff, by Beach & Brown, his attorneys, complains of Charles S. Hinchman, the above-named defendant, and thereupon said plaintiff states:

That at the time hereinafter mentioned the above-named plaintiff was and still is a citizen of the State of New York, and residing in the city of New York, in said State, and the above-named defendant was and still is a citizen of the State of Pennsylvania and residing at the city of Philadelphia, in said last-mentioned State.

That on or about the 8th day of July, 1882, and previous to the time of the agreement hereinafter set forth, the above-named plaintiff had in his possession certain securities, stocks, and bonds, as follows, to wit:

28,400 shares of the capital stock of the Stormont Silver Mining Company, 24,300 shares of the San Bruno Copper Mining Company, 800 shares of the Eagle Silver Mining Company,
10 500 shares of the Hite Gold Quartz Company, 1,819 shares of the Star Grove Silver Mining Company, 46,410 shares of the Menlo Gold Quartz Company, 600 shares of the Satemo Gold Quartz Company, 100 shares of the New York Sea Beach R. R. Co., and nineteen (19) first-mortgage bonds of par value of $500 each of the Battle Mountain & Lewis R. R. Co., which securities, stocks, and bonds he originally purchased of one John R. Bothwell subject to any claim Wells, Fargo & Co. might have upon the same for advances made by them to or for the account of the said John R. Bothwell; that thereafter this plaintiff paid to Wells, Fargo & Co. the amount of their said advances and took possession of said securities, stocks, and bonds, but stated to the above-named defendant that he was willing and would pay over to the Stormont Silver Mining Company, which company was a large creditor of the said Bothwell, and in which company said defendant was very largely

interested, any surplus which he derived in any way from said securities, stocks, and bonds after having reimbursed himself in the sum of about $26,000 and interest for advances theretofore made by him to and for the account of the said Bothwell.

That while he was thus in possession of said securities, stocks, and bonds, and on or about the 8th day of July, 1882, at the city of New York, the said defendant agreed to and with this plaintiff to purchase from this plaintiff his position with reference to said securities, stocks, and bonds, and to pay him therefor the sum
11 of eighteen thousand dollars, lawful money of the United States, and this plaintiff thereupon delivered to said defendant the said securities, stocks, and bonds.

That said defendant has ever since refused, and still does refuse, to pay to the plaintiff therefor the said sum of eighteen thousand dollars and interest.

Wherefore plaintiff demands judgment againt the said defendant in the sum of eighteen thousand dollars and interest on the same from the eighth day of July, 1882, besides the costs of this action.

BEACH & BROWN,
Plff's Atty's, 120 *Broadway, New York City.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Rufus P. Lincoln, the above-named plaintiff, being duly sworn, doth depose and say that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

RUFUS P. LINCOLN.

Sworn to before me this first day of December, 1882.
[SEAL.] HENRY FITZ RANDOLPH,
Notary Public (133) *N. Y. Co.*

12 (Endorsed:) U. S. circuit court, southern district of New York. Rufus P. Lincoln *vs.* Charles S. Hinchman. Complaint. Beach & Brown, attorneys for plaintiff, 120 Broadway, N. Y. U. S. circuit court. Filed Dec. 5, 1882. Joseph M. Deuel, clerk.

13 *Notice of Appearance.*

United States Circuit Court for the Southern District of New York.

RUFUS P. LINCOLN *against* CHARLES S. HINCHMAN.

SIR: Please to take notice that the defendant appears in this action, and that I am retained as attorney for him therein and demand that a copy of the complaint and all papers in this action be served on me at my office, number 47 William street, New York, Dec. 15th, 1882.

Yours, &c., THEODORE F. H. MEYER,
Attorney for Defendant, 47 *William St. Room* 19, *New York City.*

To Beach & Brown, Esqs., plaintiff's attorneys.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. Rufus P. Lincoln ags't Charles S. Hinchman. Notice of appearance of defendant. Theodore F. H. Meyer, attorney for defendant, 47 William st., N. Y. city. U. S. circuit court. Filed Dec. 15, 1882. Joseph M. Deuel, clerk.

14 Circuit Court of the United States for the Southern District of New York.

RUFUS P. LINCOLN *against* CHARLES S. HINCHMAN.

The defendant, answering the plaintiff's complaint, for answer thereto avers and alleges:

First. The defendant has no knowledge or information sufficient to form a belief whether or not the plaintiff, as in said complaint alleged, at the times therein mentioned was and still is a citizen of the State of New York, and residing in the city of New York, in said State, and the defendant denies that he, the defendant, at the times in said complaint alleged, was and still is a citizen of the State of Pennsyivania.

Second. The defendant admits that on or about the 8th day of July, 1882, the above-named plaintiff had in his possession certain securities, stocks, and bonds which are described in the complaint, and that the defendant was very largely interested in the Stormont Silver Mining Company.

Third. The defendant denies each and every allegation in
15 said complaint contained not hereinbefore specifically admitted or denied.

Wherefore the defendant demands judgment that the said complaint be dismissed with costs.

THEODORE F. H. MEYER,
Attorney for Defendant, 47 *William St.,*
Room 19, *New York City.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles S. Hinchman, being duly affirmed, says that he is the defendant in this action; that the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

CHAS. S. HINCHMAN.

Affirmed before me this 8th day of January, 1883.
[SEAL.] THEO. H. FRIEND,
Notary Public, New York City & Co.

(Endorsed:) U. S. circuit court. Rufus P. Lincoln *vs.* Charles S. Hinchman. Answer. Theodore F. H. Meyer, att'y for def't, 47 William St., N. Y. city. U. S. circuit court. Filed Jan. 13, 1883. Joseph M. Deuel, clerk.

16 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the sixth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Alfred C. Coxe, judge.

RUFUS P. LINCOLN *vs.* CHARLES S. HINCHMAN.

Now comes the plaintiff, by Augustus C. Brown, his attorney, and moves the trial of this cause. Likewise comes the defendant, by Wm. A. Fullerton, Esq., his attorney. Thereupon a jury is impanelled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on February 11th, 1884, the jury retire, and on their return render a verdict, whereby they find for the plaintiff in the sum of $18,000, with interest thereon from July 8th, 1882.

On motion of Mr. Fullerton the court orders that the defendant have a stay of proceedings on the verdict for forty days from February 11th, 1884.

A copy: TIMOTHY GRIFFITH, *Clerk.*

17 *Judgment. July 5th,* 1884.

In the Circuit Court of the United States for the Southern District of New York.

RUFUS P. LINCOLN, Plaintiff,
ag'st
CHARLES S. HINCHMAN, Defendant.

The issues in this action having been regularly brought on for trial before Hon. Alfred C. Coxe and a jury at a stated term of said circuit court on the 6th day of February, 1884, and the issues having been tried, and the jury having duly rendered a verdict for the plaintiff on the 11th day of February, 1884, for the sum of eighteen thousand dollars, with interest thereon from the 8th day of July, 1882, to the 11th day of February, 1884, to wit, for the sum of nineteen thousand seven hundred and nineteen dollars, and plaintiff's costs having been duly adjusted at five hundred and ninety-three $\frac{11}{100}$ dollars, including interest on said verdict:

Now, on motion of Augustus C. Brown, surviving member of Beach & Brown, attorneys of record for the plaintiff, it is considered and adjudged that the plaintiff, Rufus P. Lincoln, do recover of the defendant, Charles S. Hinchman, the sum of nineteen thousand seven hundred and nineteen dollars, found by the jury, with five hundred and ninety-three $\frac{11}{100}$ dollars costs, including interest on said verdict, amounting together to the sum of twenty thou-

18 sand three hundred and twelve $\frac{11}{100}$ dollars, and that the plaintiff have execution against the defendant therefor.

Judgment signed this 5th day of July, 1884.

TIMOTHY GRIFFITH, *Clerk.*

(Endorsed:) U. S. circuit court, southern district of New York. Rufus P. Lincoln *ag'st* Charles S. Hinchman. Judgment. Beach & Brown, attorneys for plaintiff, 120 Broadway, N. Y. U. S. circuit court. Filed July 5, 1884, 11 a. m. Timothy Griffith, clerk.

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

RUFUS P. LINCOLN

AGAINST

CHARLES S. HINCHMAN.

Defendant's Bill of Exceptions.

UNITED STATES OF AMERICA, Southern District of New York, } ss.:

Be it remembered that on the 6th day of February, 1884, the issues joined in this action came on for trial before the Circuit Court of the United States, for the Southern District of New York, held by the Hon. Alfred C. Coxe, the Judge duly appointed to hold said Court, and a jury, and the trial was concluded on the 11th day of February, 1884. The following proceedings took place:

On the application of plaintiff's counsel in open Court the Court allowed the plaintiff to amend his complaint, by striking out the word "Pennsylvania" and inserting "New Jersey," and striking out the words "in the City of Philadelphia" in the second clause thereof.

It was stipulated in open Court that the defendant's answer stand as his answer to the amended complaint, the plaintiff waiving all objection to the form of the answer or of the denials therein.

It was stipulated by and between the counsel for the respective parties that the plaintiff is a resident of New York, and the defendant of New Jersey.

The plaintiff by his counsel opened the case, and then called MASON W. TYLER, as a witness on the part of the plaintiff, who being duly sworn and examined, testified as follows:

BY MR. BROWN:

Q. Where do you reside?

A. Plainfield, New Jersey.

Q. What is your profession?

A. I am a lawyer.

Q. Practicing where?

A. In New York City; I am a member of the firm of Tremaine & Tyler.

Q. Your office is?

A. 167 Broadway.

Q. Do you know the plaintiff and the defendant in this action?

A. I do.

Q. Were you professionally employed by either in any transaction with reference to what I have called the Bothwell securities in my opening?

A. I was employed by the plaintiff.

Q. Did you at any time, on behalf of the plaintiff, have any transaction with Mr. Hinchman, the defendant, with reference to a purchase by him of the Bothwell securities?

A. I did.

Q. Will you state when that was?

A. On the 7th of July, 1882.

Q. Where was it?

A. It was at number 2 Nassau street, I think, in the office of the Stormont Mining Company and other mining companies represented by Clark & Bothwell the previous year.

Q. Who were present?

THE WITNESS: At the making of this contract?

MR. BROWN: Yes, sir.

A. Only Mr. Hinchman and myself.

Q. Did you have any transaction with Mr. Hinchman, the defendant, with reference to these Bothwell securities prior to the 7th of July?

A. Yes, sir; I did.

Q. State, if you please, fully what the transaction was, and follow it right down.

A. On the 3d of May, I think it was, 1882, I received a note from Dr. Lincoln, saying that he—

MR. FULLERTON: No.

Q. Do not give the contents; you received the note and—

A. In conseqnence of that note I went down and called upon Mr. Hinchman. I called first at the Stormont company. Not finding him there, I went down to the office of the Denver & Rio Grande.

Q. Railroad company?

A. Railroad company. I heard that he was there. And I told him that I heard that he had received from Wells, Fargo & Co. a list of securities which had been assigned to Dr. Lincoln by John R. Bothwell, and that I was directed by Dr. Lincoln to make a demand upon Wells, Fargo & Co. for those securities, and to make a tender of the amount that was due upon them.

Q. Did you show Mr. Hinchman the assignment?

A. I did not.

Q. Well, what was done or said further?

A. We had various conversations during the day. I said to Mr. Hinchman that I did not want to have any trouble about this matter, that I knew that he was in a good deal of trouble with reference to this mining company, owing to the defalcation of Mr. Bothwell, and that I had no desire to further embarrass him. I simply had this duty to perform, which was to protect Dr. Lincoln's rights. That Dr. Lincoln had an assignment of those securities from Mr. Bothwell, and that I, myself, had taken to the firm of Wells, Fargo & Co. a copy of that assignment, with a notice of his claim, and served it upon them several days previous; and that they, therefore, must know that Dr. Lincoln owned those securities; and that if he had received them they were responsible to him for that wrong.

Q. One moment (handing the witness a paper). Is this the bill of sale that you showed to Wells, Fargo & Co., and to which you alluded in talking with him?

A. Yes, sir.

The bill of sale thus identified was then put in evidence and marked "Plaintiff's Exhibit No. 1," and is as follows:

"Know all men by these presents, That I, John R. Bothwell, "of the City, County and State of New York, party of the first "part, for and in consideration of the sum of eleven thousand "five hundred dollars, lawful money of the United States, to me "in hand paid, at or before the ensealing and delivery of these

" presents, by Rufus P. Lincoln, of the same place, party
" of the second part, the receipt whereof is hereby
" acknowledged, have bargained and sold, and by these
" presents do grant and convey unto the said party of
" the second part, his executors, administrators and as-
" signs, all the right, title and interest which I have in
" and to the following described securities—thirty-three thou-
" sand nine hundred shares of the Stormont Silver Mining Com-
" pany, twenty-four thousand three hundred shares of San Bruno
" Copper Company, forty-six thousand six hundred and ten shares
" of the Menlo Gold Mining Company, six thousand shares of the
" Satemo Gold Mining Company, fifty eight hundred shares of the
" Eagle Silver Mining Company, two thousand and eighty-nine
" shares of the Star Grove Silver Mining Company, one hundred
" shares of the New York & Sea Beach Railroad Company, five
" hundred shares of the Hite Gold Mining Company, and twenty
" bonds of the Battle Mountain & Lewis Railroad Company of the
" par value of five hundred dollars each, certificates for which
" shares and which bonds are now held by Wells, Fargo & Com-
" pany, to secure an indebtedness from me to them of about the
" sum of twelve thousand dollars.

" To have and to hold the same unto the said party of the
" second part, his executors, administrators and assigns forever,
" and I do for my heirs, executors and administrators, covenant
" and agree, to and with the said party of the second part, to war-
" rant and defend the sale of the said securities, shares and bonds
" hereby sold unto the said party of the second part, his executors,
" administrators and assigns, against all and every person and
" persons whomsoever, and I authorize and empower Wells,
" Fargo & Company to transfer and deliver to said Rufus P.
" Lincoln, his executors, administrators and assigns, when my
" indebtedness to them shall be paid, all or any residue of said
" securities that may remain after the payment of said indebt-
" edness.

" In witness whereof I have hereunto set my hand and seal
" the thirtieth day of April, in the year one thousand eight hun-
" dred and eighty-two.

" JOHN R. BOTHWELL. [L. S.]

" Sealed and delivered in the presence of

" MASON W. TYLER."

Q. Proceed Mr. Tyler.

A. He replied that he wished Dr. Lincoln would make some arrangement with the Stormont Company to hold those securities, and after getting back the money that he had advanced if they would surrender them, he wanted to have Dr. Lincoln agree that after getting back the money, the $15,000 which he had paid to Wells, Fargo & Company, that he would give the Stormont Company the benefit of any surplus that was derived from the sale of those securities, or the other companies that Clark & Bothwell were interested in after the Stormont Company was paid.

Q. Do I understand you correctly, when I understand you to say that the defendant offered to surrender to you those securities if the Doctor would make the arrangement, that after paying himself the $15,000 which he was to advance and the $11,500 which was due the Doctor?

A. No, the suggestion was that he wished Dr. Lincoln to make an arrangement with him to market those securities, and after getting back the $15,000 that he had paid to Wells, Fargo & Company for those securities, that he and the Stormont Company would divide the balance above that, until he was paid his claim against Bothwell, his $11,500 in full; they each receiving $11,500 eventually by the arrangement; and after that any balance to go to the Stormont Company, until that was paid in full; and any balance above that to go to the other companies that Clark & Bothwell were indebted to.

Q. What was the amount of the Stormont indebtedness then talked about between you?

A. I do not remember; it was a large amount; fifty or sixty thousand dollars. I told him that my instructions from Dr. Lincoln were simply to made a tender of the amount and to get those securities, and I hadn't any other instructions in the premises. But finally, at his solicitation, I said I would go up and see Dr. Lincoln and see if he would attend to any such proposition as Mr. Hinchman suggested. So I went up to see Dr. Lincoln at his house. I told him Mr. Hinchman's suggestion and request in this matter. Dr. Lincoln talked over the matter for half or three-quarters of an hour I should think, and finally said—

Q. Proceed.

A. I went up and saw Dr. Lincoln and came back and told

Mr. Hinchman that Dr. Lincoln declined absolutely to make any arrangement with him with reference to the securities, and directed me positively to make the tender to Wells, Fargo & Co. of the amount due and to get those securities; saying after he had the securities, if he saw fit to make any arrangement with Mr. Hinchman, that was well enough, but the first thing he wanted was those securities. Mr. Hinchman then said to me, "If that is his final purpose I will surrender the securities." "Well," I said, "I can't do anything, I must make my tender to Wells, Fargo & Co.; those are my instructions; if you please to give me the securities after I have made the tender, all right and well; but my duty is to make the tender to Wells, Fargo & Co. first." "Well," he says, "I will go with you," so we went down—I went down to Dr. Lincoln's bankers and got a check for $15,000, Mr. Hinchman being with me, and we went over to the office of Wells, Fargo & Co. and I saw Mr. Parsons, the manager of Wells, Fargo & Co., and I said to Mr. Parsons: "I have come to demand the securities which you held as collateral to the account of Mr. Bothwell and to make a tender of the sum of $15,000 in payment of his indebtedness to you." It was all very pleasant at that time, and Mr. Hinchman said or I said "This is a mere formality; Mr. Hinchman is going to surrender the securities, but it is my duty to make the tender to you." I handed over the check to Mr. Parsons, and Mr. Hinchman took it and he said to Mr. Parsons, "I suppose those brokers are perfectly good for that amount, aint they?" Mr. Parsons said "Who are they?" I said "They are Van Eamburg & Atterbury;" and he said "Well, I do not know much about them but I guess they are." And he took the check and we went out of the office of Wells, Fargo & Co.

By Mr. Fullerton: Q. Who took the check, please?

A. Mr. Hinchman. We went out of the office of Wells, Fargo & Co., and over to the Denver & Rio Grande office, and Mr. Hinchman there delivered to me the securities.

By Mr. Brown: Q. Those are the securities in suit here?

A. Yes.

Q. About what date was that?

A. That was on the 4th of May, I think, 1882.

Q. Well, what afterwards transpired?

A. Afterwards I was in the office of the Stormont Co. Mr. Hinchman was standing at his desk in the rear part of that office, writing, and I said to him—

BY THE COURT. Q. Is this the 7th of July?

A. This is the 7th of July, yes, sir. I said to him: "The position of these securities is rather peculiar." We had had some previous conversation with reference to Dr. Lincoln's paying the assessment upon these securities.

BY MR. BROWN: Q. I have no objection unless it is objected to by the other side, to your telling the whole story, going right along chronologically. You may go on.

A. I should have said after this interview on the 4th of May. I said to Mr. Hinchman at that time: "If I can persuade Dr. Lincoln to hold those securities for the benefit of the Stormont Company, and of the other creditors of Clark & Bothwell, after his debt is paid I will do so, but I have no authority to make any such arrangement to-day." On a subsequent day I saw Dr. Lincoln, and Dr. Lincoln assented to that arrangement, and I informed Mr. Hinchman of that fact, that Dr. Lincoln had consented to give the Stormont Company, and the other companies who were creditors of Clark & Bothwell, the benefit of any surplus there should be in those securities after the debt was paid. On the 7th of July, when this conversation took place with Mr. Hinchman in the Stormont office, I said to Mr. Hinchman, that Dr. Lincoln holding these securities for the benefit of the Stormont Company eventually, in a measure, ought not to be obliged to pay any assessment that was at the time demanded of the stockholders of the Stormont Co.

Q. Some assessments had in the meantime been levied upon the stock, had there?

A. Yes. We were talking about that. Finally I said in the course of the conversation, "Mr. Hinchman, you are a large loser by this Stormont Company. Dr. Lincoln will sell out his claim at a discount. Why don't you buy the securities of him and get rid of them?" He said: "How much is his claim?" I said: "You know it is $26,500 in all." "Well," says he, "How much will he take."

I said: "He has told me he would take $22,000 for those securities; that is, he would lose $4,500;" Mr. Hinchman sat there and figured at the desk a few minutes, and he said that he thought that was too much. "Well," I said, "make him an offer then;" and finally he said: "I will give him $18,000 for those securities. "Well," I said—Dr. Lincoln was at that time in the other room in the front office presiding over a meet-

ing of one of those mining companies—meeting of the stockholders—

By Mr. Brown: Q. He was also a creditor of Bothwell?

A. No, a debtor. I said: "I will go in and speak to him, and see what he says;" and I went in and saw Dr. Lincoln; and in the course of a few minutes I came back and said: "Dr. Lincoln accepts that offer; he will take $18,000 and give you the securities." He was at that time talking with some other gentlemen that had come in meanwhile, and I said: "When shall we close the transaction?" "Well," he said, "Come in to-morrow afternoon." "Well," I said, "What hour?" and he said: "At three o'clock." and I went in and reported to Dr. Lincoln that he had agreed to buy these securities for $18,000, that he had accepted the proposition. Afterwards, after the meeting was over, Dr. Lincoln and I were going out; and as we went out of the office Dr. Lincoln said to him, in my presence, "Well, I hear you have concluded to buy the Bothwell securities." He said "Yes;" and Dr. Lincoln said to him. "Well, when will you close the transaction?" He says: "I have appointed to-morrow afternoon at three o'clock here." Dr. Lincoln said: "All right, we will come and deliver them." He asked him something about where they were, and he told him they were in the Safe Deposit Company, and said: "We will come to-morrow afternoon at three o'clock and deliver them." Dr. Lincoln came down the next afternoon at three o'clock to my office with the securities. We went over to Mr. Hinchman's office, and met there Mr. Van Rensselaer.

Q. What was his relation, if any, existing in a business way, or in an office connection with Mr. Hinchman, the defendant?

A. Mr. VanRensselaer was the treasurer, I think, and secretary of the Stormont Company; he was an intimate friend of Mr. Hinchman, was the man that went West with him when he went West in connection with these mining affairs. He was his representative here in New York.

Q. Proceed, Mr. Tyler. Did you find Mr. Hinchman at the office?

A. Mr. Hinchman was not there, but we were met by Mr. VanRensselaer.

Q. Did you make any inquiry for Mr. Hinchman, and did you receive any reply from any person?

A. We did; we inquired for Mr. Hinchman.

Q. Of whom did you inquire?

A. We inquired of Mr. VanRensselaer.

Q. Was he the only person in Mr. Hinchman's office at that time?

A. He was; there may have been a clerk there; I don't know positively.

Q. Was he the person in charge?

A. He was the person in charge.

Q. That was the 8th day of July, the afternoon of the 8th?

A. The 8th of July, yes, sir.

Q. What did you do?

A. We delivered the securities to Mr. Van Rensselaer.

Q. Did you receive from him any paper?

A. I received a receipt from him, yes, sir.

Q. (Handing the witness a paper) is that the one?

A. Yes.

The paper thus identified is marked "Plaintiff's Exhibit No. 2."

Q. (Handing the witness a paper) will you look at the paper I now show you, and state whether that is the letter you received from Mr. Hinchman?

A. No, I did not receive that.

Q. Dr. Lincoln received it?

A. Yes, sir.

Q. Did you have any conversation or correspondence with Mr. Hinchman yourself with reference to that letter, subsequently?

THE WITNESS: Let me see, what is the date of that letter?

MR. BBOWN: That is the 22d of July.

A. I did, sir; yes, sir.

The letter thus identified is put in evidence, and marked "Plaintiff's Exhibit No. 3" and is as follows:

"No. 208 South 4th St.,
"Phila. July 22d, 1882.

"DR. R. P. LINCOLN,
"No. 22 West Thirty-first street, New York.

"DEAR SIR—Your favor of the 21st as well as Mr. Tyler's duly "received. I did not understand that the negotiation between us

"was finally concluded, but as I explained to Mr. "Tyler there were some other questions which would "have to be settled before I could act in the matter "on account of my being a trustee. I told Mr. Van- "Rensselaer that he could receive the Stormont stock, "held by you for joint account of yourself and Stormont, "without requiring you to advance any more money and "that I would arrange with you about it; and he, knowing "that I was in negotiation with you, took charge of the whole as "handed to him by Mr. Tyler, your counsel. There are several "questions which come up in regard to it, and I cannot give you "any definite reply until I have conferred with counsel and my "co-trustees on the subject. My advice to you is to exchange the "Stormont stock for receipts, as a majority have already done, "on receipt of this; and if you do so and not convenient for you to "advance the contribution for additional stock, I will see that it "is carried until we have an opportunity to fix up the whole "matter."

"Yours truly,

"C. S. HINCHMAN."

Mr. Brown read the following extract from Exhibit No. 3:

"I told Mr. Van Rensselaer that he could receive the Stor- "mont stock held by you for joint account of yourself and Stor- "mont without requiring you to advance any more money; that "I would arrange with you about it; and he, knowing that I "was in negotiation with you, took charge of the whole as "handed to him by Mr. Tyler, your counsel."

MR. BROWN: I respectfully submit to your Honor that that was an authorization for Mr. Van Rensselaer to represent this gentleman and receive this stock, or a part of it, for some purpose, and that makes the declarations of the agent to this gentleman at that time competent as to the declarations of the defendant.

Q. I now ask Mr. Tyler to proceed and state what that conversation was with Mr. Van Rensselaer?

MR. FULLERTON: Surely that is not admissible; his agency was limited, his duty was performed, and whatever he said to Mr. Tyler was outside of that agency.

MR. BROWN: I read that for the purpose of showing that this man Van Rensselaer was authorized to receive the Stor-

mont stock from these gentlemen on the occasion when they went there.

THE COURT: I will sustain the objection for the present.

MR. BROWN: I will read that receipt:

"OFFICE OF THE
"STORMONT SILVER MINING CO.,
"No. 2 Nassau, corner of Wall street,
"NEW YORK, July 18, 1882.

MR. FULLERTON: We object to the receipt given by Mr. Van Rensselaer for these stocks. It is enough for them to show that the stocks were delivered to Mr. Van Rensselaer; that is what he was authorized to do, viz: to receive them.

MR. BROWN: The receipt has been marked in evidence. Mr. Fullerton states that he had not understood the receipt to be offered yet.

THE COURT: We will assume that the receipt is not in evidence now.

BY MR. BROWN: Q. The receipt marked "Exhibit No. 2," is in your handwriting and the signature Mr. Van Rensselaer's?

A. Yes, sir.

THE COURT: I will receive the receipt.

Defendant's counsel excepts.

Plaintiff's Exhibit No. 2 was then read in evidence, and is as follows:

"OFFICE OF
"STORMONT SILVER MINING COMPANY,
"No. 2 Nassau, cor. of Wall street.
NEW YORK, July 8th, 1882.

"President,
"WILLIAM S. CLARK.
"Secretary,
"JOHN R. BOTHWELL.

"Received of Dr. Rufus P. Lincoln the following certificates "of stock on behalf of C. S. Hinchman, and to be delivered to "him when he fulfills his contract with Dr. Lincoln to purchase "said stocks for $18,000 for

"28,400 shares Stormont Silver M'g. Co.
"24,300 " San Bruno Copper " "

" 800 shares Eagle Silver M'g. Co.
" 500 " Hite Gold Quartz M'g. Co.
" 1, 81 " Starr Grove Silver M'g. Co.
" 1,410 " Menlo Gold Quartz Co. & order on Wells,
" Fargo & Co. for 45,000 shares " "
" 600 shares Satemo Gold Quartz "
" 100 " N. Y. & Sea Beach R. R. Co.
" Also $9,500 in first mortgage bonds of the Battle Mn. &
" Lewis R. R. Co.

" SCHUYLER VAN RENSSELAER.

" Witness:
" M. W. TYLER."

Q. You did not see Mr. Hinchman that afternoon?
A. No, sir.
Q. What did you do next?
A. I went to the Stormont office on Monday morning.
Q. The 7th was that?
A. The 7th was Friday; the 8th was Saturday. That was Saturday afternoon; Monday morning I went to the Stormont office and heard that Mr. Hinchman was not there, although he had been expected.
Q. What did you next do?
A. The next day I telegraphed to Mr. Hinchman by Dr. Lincoln's directions.
Q. (Handing witness a telegram.) One moment. Is this the telegram which you sent on Tuesday morning?
A. I believe it is.

The telegram thus identified is put in evidence, and marked "Plaintiff's Exhibit No. 4," and is as follows:

" NEW YORK, 7, 11, 1882.

" TO CHARLES S. HINCHMAN:
" Please make appointment for closing negotiation with
" Lincoln.
"
M. W. TYLER."

Q. On the 7th of July, when you had an interview with Mr. Hinchman at his office, was anything said during that interview with you, or during the subsequent interview, when Dr. Lin-

coln came in and joined you, as you have testified, with reference to the Stormont Co., was it named in any way, shape or manner?

A. No, sir.

Q. Subsequent to the receiving of the receipt, which has been marked Exhibit No. 2, did you furnish a copy to Mr. Van Rensselaer, who gave this receipt?

A. I did; I think some time in September.

Q. Do you remember about what time in September?

A. Well, I should think the latter part of September. I am not absolutely certain. He wrote me a letter asking for it, and I sent it to him.

Q. (Handing the witness a paper.) Will you look at the paper that I now show you and see whether that refreshes your recollection as to the date, and, if so, state what the date was?

A. Yes; I think I sent him the copy of the receipt in response to that note.

Q. What was the date?

A. September 15th, 1882.

Q. Did you or Dr. Lincoln ever receive any notification or communication from the defendant Mr. Hinchman, objecting to that receipt or to the form of it in any way?

A. No, sir; I never did.

Q. And, so far as you know, Dr. Lincoln never did?

A. So far as I know, he did not.

Q. You had stated at the last meeting that on July 11th you sent a telegram to Mr. Hinchman, in Philadelphia, reading: "Please make appointment for closing negotiation with Lincoln." Did you receive any communication in response to that telegram?

A. I received a telegram in reply, and a note afterwards, I believe.

Q. (Handing witness a paper.) Will you look at the paper I now show you and state whether that was the telegram you received in reply?

A. That was.

Q. And is the note annexed the note you received?

A. It was.

Plaintiff's counsel offers in evidence the telegram and note thus identified.

By Mr. Fullerton: Q. Did you say you received the telegram from Mr. Hinchman?

A. I say I received a telegram in reply, and that is the telegram.

The telegram is marked plaintiff's Exhibit No. 5, and is as follows:

"Philadelphia, July 11th.

"Mason W. Tyler,
"167 Broadway, N. Y.

"Mr. Hinchman away till Thursday or Friday, perhaps "longer.

"W. C. Arrison."

The note is marked "Plaintiff's Exhibit No. 6," and is as follows:

"No. 208 South Fourth St.,
"Phila., 7, 14, '82.

"M. W. Tyler, Esq.,
"167 Broadway, N. Y.

"Dear Sir—Acknowledging your telegram of the 11th inst., "Mr. Hinchman desires me to say that he will let you know "when he can see you in N. Y., but that the pressure of busi- "ness here prevents his fixing a day immediately.

"Yours truly,
"Wm. C. Arrison,
"For Chas. S. Hinchman."

"My dear Chum:

"Enclosed just received. July 15, 1882.—M. W. T."

By Mr. Brown: Q. The memorandum in ink at the bottom of this letter, Exhibit No. 6, was no part of the letter when you received it?

A. No, sir.

Q. That is a memorandum of your own?

A. Yes, sir.

Q. Subsequent to the receipt of this telegram and this letter, did you see Mr. Hinchman?

A. I did.

Q. When was that, and where?

A. My recollection is that the next time I saw him was on the 20th of July. I went down to the Stormont office several times between the 14th and the 20th, but did not find Mr. Hinchman there. But on the morning of the 20th I went down there and met Mr. Hinchman coming out of the office, in the hall.

Q. What occurred at that interview?

A. I said to Mr. Hinchman that I had been looking for him for several days, and that I supposed he knew we had delivered the securities—the Bothwell securities, to Mr. Van Renssalaer, as he had directed; and he said, "Yes, that was all right;" and I said, "Well, now, when will you be able to close this matter?" "Well," he says, "I am in a great hurry this morning, but I will come to your office certainly this afternoon or to-morrow afternoon, at three o'clock. You can rely upon my coming and seeing you upon one or the other of those days."

Q. Was anything further said?

A. I went down in the elevator with him. There was nothing further said about this business.

Q. No reference made to the terms of the agreement other than you have given?

A. Nothing that I remember.

Q. Who else was present, if any one was present, at that interview?

A. I do not think there was anybody else present, unless it was the elevator boy.

Q. Did you see him that afternoon—did he come to your office?

A. He did not come to my office at three o'clock, and I was rather anxious to see him; so about four o'clock I went down to the Stormont office again. They said he had not been there, so I went round to the Denver & Rio Grande office, and I met him and his brother coming up Pine street. He said he had not been able to attend to it that afternoon, but he would the next.

Q. That was all the interview you had at that time?

A. That is all I remember about this matter.

Q. Did he come the next afternoon?

A. He did not.

Q. Did you receive any communication from him?

A. I did; I received a letter from him.

Q. You received a letter?

A. Yes.

Q. (Handing the witness a letter.) Will you look at the paper I now show you and state whether that is the letter?

A. Yes.

Plaintiff's counsel offers in evidence the letter thus identified, dated July 21st. The letter was then read in evidence and marked "Plaintiff's Exhibit No. 7," and is as follows:

"OFFICE OF

"STORMONT SILVER MINING COMPANY,

"No. 2 Nassau, cor. of Wall St.,

"NEW YORK, July 21, 1882.

"MY DEAR MR. TYLER:

"When I saw you and told you to expect me at 3 P. M. "either yesterday or to-day, I fully expected to be able to make "it, but have been on the go ever since, and am only half "through the work laid out for to-day. These matters require "seeing so many both here and in Pha., and listening to their "stories or else affronting them, as I hear one or two were "when cut short, that I shall have to postpone our further "negotiation until over next week—Meanwhile I will see that "no action is taken which will cut out any rights of Dr. L.

"I am so pushed by my regular business that I cannot take "up any new matter until I get some of it worked off.—Will "call on you as soon as I can.

"Yrs. truly,

"C. S. H."

Q. Did you, in response to that letter, have any interview or send any communication to Mr. Hinchman?

A. I wrote a letter to Mr. Hinchman.

Q. (Handing the witness a letter.) Is this the letter you sent in reply?

A. That is the letter; yes.

Plaintiff's counsel offers in evidence the letter thus identified. The letter was then read in evidence, and marked "Plaintiff's Exhibit No. 8." It is as follows:

"NEW YORK, July 21st, 1882.

"MY DEAR MR. HINCHMAN:

"I was much disappointed in receiving your letter this afternoon, postponing your appointment with me *in re* Lincoln negotiation. When Dr. Lincoln accepted your offer of $18,000 for his position in reference to the Bothwell securities, he did so unqualifiedly, without even suggesting a modification of your offer, in the hope that in this way he would expedite a conclusion of the matter, and believing that nothing was open except the delivery of the securities, and the receipt of the price. This was on July 7th. On July 8th, learning from Mr. Van Renssalaer that you had left word with him to receive the securities, Dr. L. called on Mr. Van R. and left with him the securities just as he received them. Now, under these circumstances, Dr. L. feels as if there was nothing left to be done except the payment of the money, and that ought not to take very long. Now I will do anything to accommodate you in this matter in the way of an appointment. If it is inconvenient for you to see me in New York, if you will appoint an early day I will meet you in Philadelphia. If you desire anything in particular should be signed or done by Dr. Lincoln in addition to what he has done already in delivering the securities to Mr. Van R., if you will write me what you request, I will prepare it and take it on with me for delivery to you. I am sorry to add to your pressing engagements, but I think you will concur with me in saying that this ought not to be delayed longer under the circumstances.

"Very truly yours,

"MASON W. TYLER."

Q. Did you receive in response to that letter any letter or communication from Mr. Hinchman?

A. I think I received one through Dr. Lincoln.

Q. Or did Dr. Lincoln receive any to give to you?

A. Yes, sir.

The letter of Dr. Lincoln to defendant is produced on request of plaintiff's counsel by the defendant, and is put in evidence and marked "Plaintiff's Exhibit No. 9." The letter was then read in evidence and is as follows:

"22 WEST 31ST STREET,
N. Y., 21 July, '82.

"CHAS. S. HINCHMAN, ESQ.:

"DEAR SIR—Agreeable to a note from Col. Tyler, I went down "town this P. M., to meet you as per appointment and receive "payment for Stormont and other stocks in accordance with "your offer. I was especially disappointed for I had promised "to apply this money this week to cancel that which I bor- "rowed when I took up the stock. I hope nothing will prevent "your carrying out our arrangement by Monday or Tuesday at "the furthest, and I will esteem it a favor if, on receipt of this, "you will telegraph me when I shall receive a check for the "amount of the consideration. I ask you to telegraph for the "reason that I have arranged to go out of town for the Sabbath "and would like to state definitely when I can return the money "to the parties from whom I borrowed it, before I leave the "city.

"Very truly yours,
"R. P. LINCOLN."

Q. (Handing the witness Exhibit No. 3,) will you look at the paper now shown you and state whether this is the one?

A. Yes, sir.

Exhibit No. 3 was then again read in evidence.

Q. On the seventh of July or subsequent thereto, did you have any interview or communication of any kind with Mr. Hinchman, such as is referred to in this letter (Exhibit 3), where he says "I explained to Mr. Tyler that there were some questions which would have to be settled before I could act in the matter, on account of my being a trustee."

A. Nothing was ever said about his acting as a trustee.

Q. Was any such interview as that ever had between you and Mr. Hinchman, before the seventh of July?

A. No, sir.

The plaintiff offered to show what was said by Mr. Tyler, Dr. Lincoln and Mr. Van Rensselaer, on the occasion of the delivery of the Bothwell securities to the latter. This was objected to by the defendant and excluded.

Q. Did you ever have any personal communications with Mr. Hinchman upon the subject of the deposit of these securities with any person upon joint account, prior to the 22d of July?

A. Such a thing was not suggested at any of these interviews. It might have been suggested at the time I had the conversation on the fourth of May with Mr. Hinchman, when he wanted to have Dr. Lincoln hold these securities for the benefit of all these companies.

Q. That was in the first interview if it occurred at all?

A. Nothing at any other time, up to this time.

Q. In reply to that letter of the defendant, Exhibit No. 3, did you communicate with him in any way; if so, how?

A. My recollection is that I wrote him a letter upon the receipt of that.

Q. Did you keep a copy of the letter that you wrote on the 24th of July?

A. I made a press copy, yes, sir.

Q. (Handing the witness a letter,) will you look at the paper I now show you and state whether that is a copy of the letter you sent?

A. This was in reply to a letter of the 24th; the letter that you read was the 22d.

MR. BROWN: That was an erroneous date.

Q. (Handing the witness paper.) Will you look at this draft and see if the first reference to the 24th was not an erroneous reference, and whether that is not the letter that is referred to?

A. I think that is.

Q. (Handing the witness a paper,) look at the paper that I now show you and state whether that is a letter that you wrote Mr. Hinchman, the defendant, in reply to the letter marked Exhibit 3?

A. Yes, sir.

Plaintiff's counsel offers in evidence the letter thus identified, which is received and marked Plaintiff's Exhibit No. 10.

Q. I see in the first line you refer to a letter to Dr. Lincoln, of the 24th, is that the correct date of the letter?

A. No, sir; the letter of the 22d is.

Q. It should be 22d instead of 24th.

A. Yes, sir.

Q. The 23d was Sunday?

A. The 23d was Sunday; the letter was received on the morning of the 24th.

Exhibit No. 10 was then read in evidence, and is as follows:

"NEW YORK, July 24, 1882.

"CHAS. S. HINCHMAN:

"DEAR SIR—In reply to your favor of 24th inst. to Dr. Lincoln, Dr. L. instructs me to say that he accepted your offer of "$18,000 for the Bothwell securities and his rights thereto, and "delivered the securities pursuant to the agreement to Mr. Van "Rensselaer, as you directed, and he feels that it was a perfectly "fair bargain, fully executed as far as he is concerned, and no "possible room for any misunderstanding. He does not desire, "however, to embarrass you and is willing to make your pay-"ments as convenient for you as circumstances will admit.

"He therefore proposes that if you will pay him $5,000 cash, "he will take your notes for the balance of the $18,000 and in-"terest from July 8th, payable in one, two and three months, "the securities being left with him as collateral until the notes "are paid.

"Yours truly,

"MASON W. TYLER."

Q. Did you subsequent to the sending of that letter have any communication or interview with Mr. Hinchman?

A. I think that the next interview that I had with him was in the early part of August.

Q. Where was that?

A. At the Stormont office.

Q. Who were present?

A. I believe Mr. Van Rensselaer was there, and Mr. Hinchman, sitting in the rear part of the room.

Q. And what occurred?

A. Well, we had some pretty warm words.

Q. Can you give them to us?

A. He (Mr. Hinchman) stated that I knew he was a trustee of the Stormont Company, and that I had dealt with him as a trustee of the Stormont Company, and that I had received the securities—bought the securities of him—instead of making a tender to Wells, Fargo & Company, and getting the securities through that process. I told him that he knew that was utterly false; that I had said to him, at the time of that transaction, that my only authority from Dr. Lincoln was to make the tender and to get the securities, and that he went down with me to Wells, Fargo & Company simply to tell them that he would surrender the securities to me and take the check up; that I insisted upon going down there and making an offer to Wells, Fargo & Company to carry out Dr. Lincoln's instructions, and that he understood it at the time perfectly well, and that the intimation that he was dealing as a trustee in the Stormont Company had never been made or suggested until his letter of the 22d of July.

Q. The 21st of July?

A. The 21st of July; the 22d of July I think it was. (Continuing:) That it was a pure afterthought, and I was very earnest, and he remained utterly silent.

Q. Do you remember anything that was said at the interview by yourself to Mr. Hinchman that you have not already repeated?

A. That was the substance of what was said.

Q. And you say that he made substantially no reply?

A. Not to those statements of mine.

MR. FULLERTON: Q. You waxed warm, I understand you?

A. I did.

BY MR. BROWN: Q. How did he "wax?"

A. He was somewhat excited.

Q. Did you subsequently communicate with him by letter?

A. I beg your pardon. I believe you asked me whether there was anything else said at that interview. I recall it now. At the close we were on rather more pleasant terms, and I said to him that I would do anything that I could to arrange this matter; and he said that he thought that Dr. Lincoln ought to be willing to sell those securities to the Stormont Company, and that he did not see why he should object to that; that he would do what he could to get the Stormont Company to buy those

securities, and that he thought the thing could be carried out on terms satisfactory to everybody. My reply to that was, that I would submit the proposition to Mr. Lincoln, and I hadn't any authority to consent to any change or modification of the contract in any way, shape or manner, but all I could do would be to submit that proposition to Dr. Lincoln, and I would let him know what Dr. Lincoln said.

Q. Prior to that interview, had anything whatever been said between you and Mr. Hinchman about the Stormont Company or any one else—or that a corporation other than himself should purchase these securities?

A. He claimed at that interview, that he had been acting as a trustee for the Stormont Company in making this purchase.

Q. Before that, in any interview with him, had he claimed that the Stormont Company had purchased them; not the trustees, but the Stormont?

A. Nothing except that after intimation thrown out in his letter that he was acting as trustee.

Q. That was his own action as a trustee?

A. Yes.

Q. At this interview that you speak of, his suggestion was that the Stormont Company should buy them, was it not?

A. Yes, sir.

Q. That suggestion had not been made before?

A. No, sir.

Q. Did you see Dr. Lincoln?

A. I did.

Q. Did you subsequent to your interview with Dr. Lincoln communicate by writing with Mr. Hinchman?

A. I did.

Q. (Handing the witness a letter.) Is that the letter?

A. It seems to be; yes, sir.

Plaintiff's counsel offers in evidence the letter thus identified, which is marked "Plaintiff's Exhibit No. 11."

The letter was then read in evidence and is as follows:

"NEW YORK, August 3, 1882.

"CHAS. S. HINCHMAN:

"DEAR SIR—Dr. Lincoln instructs me to say that he "cannot release you from your contract with him to take the "Bothwell securities at $18,000. If you desire, however, to "transfer them to the Stormont Co., and it is inconvenient for "you to pay him at present, he will take the note of the Stor-"mont Co. indorsed by you and Mr. Cochran for the entire "$18,000.

"Yours very truly,

"MASON W. TYLER."

Q. Who was Mr. Cochran?

A. He was a co-trustee with Mr. Hinchman of the Stormont Co.

Q. Resides where?

A. In Philadelphia.

Q. Did you receive in reply to that communication a letter from Mr. Hinchman?

A. I did.

Q. (Handing the witness a letter.) Is the paper I now show you the letter you received?

A. Yes, sir; that is the letter.

Plaintiff's counsel offers in evidence the letter thus identified, which is received and marked "Plaintiff's Exhibit No. 12."

The letter was then read in evidence, and it is as follows:

"PHILA., August 8th, 1882.

"DEAR SIR—In view of our interview and understanding on "the A. M. of the 2d inst. at the Stormont Co.'s office, No. 2 "Nassau St., I was surprised at the tenor of yours of the 3d "inst., and beg leave to confirm the notice I have heretofore "verbally given you that I would not and have never heretofore "negotiated with Dr. Lincoln or yourself in my individual ca-"pacity, nor other than as a trustee of, and for the Stormont "Company in regard to the securities which you obtained from "me and which you had notice, that I held as a trustee for the "ultimate benefit of the Stormont Co.'s treasury, and for which "you paid me to cover the amount I had arranged to have them

" carried on, viz.: $15,000, upon the understanding which
" was to be mutually reduced to writing and signed, and
" which I asked you to draft and submit as soon as I could get
" back from my trip to the Stormont Mines, that Dr. Lincoln,
" your client, should carry and not sacrifice or sell said securities
" but with the consent of the Stormont Co., and after repaying
" himself the said $15,000 and interest and such sum as was
" due him from J. R. Bothwell, the surplus, if any, should be
" turned over to the Stormont Co.'s treasury towards the
" amount abstracted from it by your friends Col. Clark and his
" partner, J. R. B., and that, if any surplus remained after
" satisfying the Stormont Co.'s claim, it should go to the treas-
" uries of the other Cos. managed by C. & B. in proportion to
" the amount due each.

" This agreement is as binding on you and your client to-
" day as it was the day it was made, and was named to and
" well understood by other gentlemen at the time it was
" made, and it will not do for you to forget or attempt to dis-
" regard it.

" I am the more surprised at your attempt to hold me as a
" personal purchaser of Dr. Lincoln's ' position,' since my con-
" ference with you when I told you that I would get a com-
" mittee appointed to confer with Dr. Lincoln about the matter,
" which you did not dissent from, and which committee was
" duly appointed at the last meeting of the Stormont trustees,
" and Mr. Meyer had some talk with Dr. L. at Long Beach
" about it at the Eve'g. of the 1st inst., and you, after
" telling me that Dr. L. had told you about it on the train com-
" ing up next morning, on the 2d inst. called at the Stormont
" office, and had a further long talk about it when, as I had
" before, I fully explained our position to you and said that the
" Trustees of the Stormont Co. would be glad to take over the
" securities carried by Dr. L. (for the joint acct.) as soon as
" they could see their way clear to the funds to do so. Messrs.
" Cochran and myself have no more idea of endorsing a note
" for the purpose than I presume you and Dr. Lincoln have
" of endorsing Hite Co.'s note for the Stormont Co.'s claim, but
" if you and Dr. L. (who is, I believe, V.-Pres. of the Hite
" Company) will kindly exert yourselves to carry through
" promptly the suggestion made to pay the Stormont Company
" half of its claim against the Hite Co. in cash and 1-2 bonds,

"so as to give the Co. a fair start, I could at once see "my way clear to paying Dr. L. the amount he was "willing to sell his 'position' for, viz., $18,000 (for, as I under- "stand it, there was no direct offer or acceptance) out of the "cash to be received from the Hite Company, and which I "had good reason to expect would have been paid, or partly "secured ere this time. Regretting that there should be any "misunderstanding between us,

"I remain Yrs. truly,

"CHAS. S. HINCHMAN,

"Prest. & Trustee.

"TO MASON W. TYLER, ESQ.,

"Atty. for Dr. Lincoln, &c.

"When I last saw you, I understood you to favor the idea "of disposing of the Hite claim in this way, and to promise to "do what you could toward bringing it about."

Q. In any interview with Mr. Hinchman, did you say or "favor," as he expresses it here, any such disposition to the Stormont Company of this stock as he represents here?

A. Only in the way I have stated. I told him that I would submit the proposition to Dr. Lincoln.

Q. Yes; but did you personally "favor" it in any way, he says you "favored" it.

MR. FULLERTON: It is quite immaterial whether you did or not.

THE WITNESS: I have tried very hard in various ways to see—

MR. FULLERTON: I object.

Q. I asked you whether you "favored" that disposition, the purchase by the Stormont Company of this stock from Dr. Lincoln?

A. I do not think I did.

Q. Did Mr. Hinchman at any time request you to prepare the draft and submit any paper to be signed by himself and Dr. Lincoln?

A. There was never such a thing suggested.

Q. From first to last?

A. Yes.

Q. Did he state to you that he would get a committee appointed in that interview to which he refers here in this letter?

A. He made a suggestion of that kind at that interview, I think.

Q. And for what purpose was that committee to be appointed?

MR. FULLERTON: No, what did he say?

Q. What did he say with reference to the appointment of that committee?

THE COURT: Which interview was this?

THE WITNESS: This was the interview of the second of August, I think.

A. I was to submit this proposition to Dr. Lincoln, and he said that he would get a committee appointed by the Stormont Company to act for them, with power to act in the premises to purchase this stock.

Q. To purchase this stock?

MR. FULLERTON: No; to "act for them" is as far as the witness has got.

Q. What do you mean by acting for them? What did he say; if you can give his exact language, give his language; if not, give us the substance. What was this committee to be appointed for?

A. I think all he said was that he would get a committee appointed by the Stormont Company, with power to act for the Stormont Company.

Q. When did you receive, and where did you receive this letter of August 8th, which has been marked Exhibit No. 12?

A. My recollection is, it was forwarded to me in the Adirondacks. I spent the month of August in the Adirondacks that year.

Q. And did you reply to that letter?

A. I did.

Plaintiff's counsel calls for letter of August 21, which is produced by the defendant.

Q. Is this the letter, Mr. Tyler?
A. That is the letter; yes, sir.

Plaintiff's counsel offers in evidence the letter thus identified, which is received and marked Plaintiff's Exhibit No. 13.

The letter was then read in evidence, and is as follows:

" UPPER SARANAC, ADIRONDACKS,
" Aug. 20, 1882.

" CHARLES S. HINCHMAN:

" DEAR SIR—Your amiable letter of August 8th, reached me " just as I was starting on my vacation. I have been on the go " and in the woods ever since.

" I must decline to enter a controversy of personal innuendo " —life is too short.

" Why you should repeat on paper your unfounded version " of Dr. Lincoln's obtaining the Bothwell securities which we " discussed at a recent interview, and you then assented to in " its corrected shape, is more than I can understand, but all " this is outside the matter in hand. Your claim now is that " you negotiated with Dr. Lincoln in the purchase of the Both- " well securities as a Stormont trustee, and not in your indi- " vidual capacity. My answer to that is twofold.

" 1st, you did not in fact, and 2d, you could not in law " negotiate for those securities as a Stormont trustee. During " those negotiations, there was not a reference made in any " way to the Stormont Company or its trustees, and there could " have been no intention therefore on your part or mind to make " a transaction for that company, but beyond all this, it was, " and is no part of a trustee's duty, and entirely without the " company's powers to make such a contract. If we had made " such a contract, we could not have enforced it. The plain " question then is, do you intend to abide by your contract. If " you do, say so, and the terms of payment we will try to " arrange to your satisfaction. If, on the other hand, you " repudiate the contract, say so. At least, we shall each of " us then know where we stand, and can act accordingly.

" Yours truly,
" MASON W. TYLER."

Q. Did you, subsequent to that letter, have any communications, either verbal or in writing, with Mr. Hinchman?

A. I received a reply to that letter from Mr. Hinchman.

Q. Will you look at the paper I now show you and state whether that was the reply?

A. Yes, sir.

Plaintiff's counsel offers in evidence the letter thus identified, dated August 24th, which is marked "Plaintiff's Exhibit No. 14."

The letter was then read in evidence and is as follows:

"NEW YORK, August 24, 1882.

"COL. MASON W. TYLER,

"167 Broadway, New York.

"DEAR SIR—I have received your favor dated 20th or 21st "inst., and beg leave to differ with your conclusions as to the "way in which you obtained for Dr. Lincoln *et al.* the Bothwell "securities, and 'his position' therein. You obtained them from "me with full knowledge of my 'position' as a trustee, and "that I so held them, duly delivered from Wells, Fargo & Co., "under a bill of sale, and you paid me $15,000 by check in the "office of Dr. Lincoln's brokers, which I told you covered the "amount I was out of pocket thereon, including my expenses, "over amount paid by me to Wells, Fargo & Co., with the dis-"tinct understanding on my part that you would, as Dr. Lin-"coln's attorney, advise him to carry out the suggestions talked "over between us, viz., that he would carry said securities and "not sell them without the consent of the Stormont Co., and "that the proceeds should be first applied to repay Dr. L. said "$15,000 and interest thereon; next, the amount due him from "J. R. Bothwell, then indefinitely stated as being from about "$10,500 to $11,500 for borrowed money, and that after making "such repayments the balance should go first to the Stormont "treasury to make good the amount abstracted by C. & B. "therefrom, and that if any surplus remained it should go to "the treasuries of the other companies recently run by C. & B., "pro rata. I then accompanied you to W., F. & Co., and you "withdrew your notice to them, and it with copy of Bothwell's

"assignment was handed me on our statement to them that "our matters had been mutually arranged. As I was then "on the eve of starting West to save Stormont property from "passing into the creditors' hands at yours and other gentlemen's "suggestions, and had not the time to draft the paper embodying "our understanding and agreement to be signed by Dr. L. and "self, I asked you to draft and submit it on my return; and I "understood you to say, before I left for the West, that Dr. L. "had accepted your suggestion and agreed to so carry them. "That this was the original understanding is confirmed by your "submitting, soon after our return from the West, and asking "Stormont's approval of Col. Clark's offer to pay Dr. Lincoln a "certain amount ($10,000 I believe you mentioned) in notes en- "dorsed by Mrs. Clarke or cash, and take part of these Bothwell "stocks to settle with the other companies and creditors of C. "& B., which Stormont officers and trustees then declined to "approve of.

"Yours, truly,

"CHAS. S. HINCHMAN,

"Prest.

"I have submitted the whole matter, and this to a majority "of Stormont trustees and all I could see, and have negotiated "and written throughout with their approval."

Q. Subsequent to the receipt of that letter did you have any other communication or conference with the defendant?

A. I did not reply to that letter; I think I saw him two or three times after that, but nothing was done until Dr. Lincoln instructed me to make the demand upon Mr. Van Rensselaer.

Q. Did you make such a demand in writing?

A. I did.

Plaintiff's counsel calls for the demand referred to, dated November 16th, which is produced by the defendant.

Q. (Showing the witness the demand). Is that the demand that you made upon Mr. Van Rensselaer?

A. Yes, sir.

Plaintiff's counsel offers in evidence the demand thus identified, which is marked "Plaintiff's Exhibit No. 15."

The demand was then read in evidence and is as follows:

"To SCHUYLER VAN RENSSELAER:

"As Mr. Charles S. Hinchman refuses to fulfill his contract with Dr. Lincoln to purchase certain securities delivered to you on the 8th day of July, 1882, for Mr. Hinchman, I hereby demand the immediate return of the securities to me, to wit, Certificates for

"28,400 shares of the Stormont Co.'s stock or its equivalent.
"24,300 " " San Bruno Mining Co.'s stock.
" 800 " " Eagle Silver " "
" 500 " " Hite Gold Quartz " "
" 1,819 " " Star Grove Silver " "
" 46,410 " " Menlo Gold Quartz Co.'s "
" 600 " " Satemo " " "
" 100 " " N. Y. & Sea Beach R. R. Co.'s stock.
"$9,500 in First Mortgage Bonds of the Battle Mountain & Lewis R. R. Co.

"Dated New York, November 16, 1882.

"Yours, &c.,
"RUFUS P. LINCOLN,
"By M. W. TYLER,
"Atty."

Q. Did you receive a reply to that communication?
A. I did.
Q. (Handing the witness a paper) Look at the paper I now show you and state whether that is the reply?
A. Yes, sir.

Plaintiff's counsel offers in evidence the letter thus identified, which is received and marked "Plaintiff's Exhibit No. 16."

The letter was then read in evidence, and is as follows:

"NEW YORK, November 20, 1882.

"DR. R. P. LINCOLN:

"SIR. In answer to the demand made upon me through Mr. M. W. Tyler, I beg to say that I hold the securities mentioned therein on behalf of yourself and Mr. C. S. Hinchman, and I

" have no interest in or claim upon them personally. I " have been notified by Mr. Hinchman not to deliver " them to you, and for that reason shall not be able to accede to " your demand. Any arrangement agreed to by yourself and " Mr. Hinchman shall have my prompt acquiescence.

" I am, &c., &c.

" S. VAN RENSSELAER,

" Per NASH & KINGSFORD,

" His Attys."

Q. Did anything occur, subsequent to the receipt of this reply, between you and Mr. Hinchman, previous to bringing this action?

A. I think not.

Q. The action was then brought in December, was it?

A. I believe so; I don't remember exactly about the time of bringing the action.

Q. You stated yesterday that at some time after your first conversation with Mr. Hinchman, an assessment was levied upon the Stormont stock by the Stormont Co.; what was that assessment?

A. 25 cents a share.

MR. FULLERTON: I object to that as immaterial.

THE COURT: The witness has answered.

MR. FULLERTON: Then I move to strike out that answer.

Motion denied. Defendant excepts.

Q. The number of shares of Stormont stock embraced in the Bothwell securities was 28,400, was it not?

A. Yes, sir; I think so.

Q. 25 per cent. of that would be seven thousand one hundred dollars, wouldn't it?

A. Yes, sir.

CROSS-EXAMINED BY MR. FULLERTON:

Q. At any time between this conversation between yourself and Mr. Hinchman, or between yourself and Mr. Lincoln, or you all three, was the subject of drawing up a paper in reference to what took place ever suggested or talked of?

A. Do you mean during the pendency of——

Q. (Interrupting) At any time? The question is broad and covers the whole ground.

A. I do not think there ever was, except in that letter.

Q. Are you positive upon that subject?

A. Yes, sir.

Q. You are positive?

A. Yes, sir.

Q. It was never even suggested by anybody?

A. You refer, as I understand it, to the contract or the agreement, as Mr. Hinchman alleges it to be, that Dr. Lincoln should carry these stocks for the joint benefit——

Q. I refer to just what my question contains. At any time, during any of these interviews, was it ever suggested that there should be put in writing something in reference to what took place? That is my question?

A. At any of these interviews that have been testified to, do you mean, by me?

Q. At any interview, from first to last, between you gentlemen whom I have named in my question. You may put it as long back as you please, or down to the present day if you please.

A. Well, what——

THE COURT. Was there any suggestion to put it in writing?

Q. Don't you understand my question?

A. No, sir; I do not.

MR. FULLERTON: Then I won't press it. Remember there was a question put, which you have not answered.

Q. (Handing the witness a paper.) Please look at the paper I now show you and see whether that is in your handwriting?

A. Yes, sir.

The paper thus identified is marked for identification, "Defendant's Exhibit A."

Q. (Handing the witness a paper.) Look at this other paper that I now show you and see whether you identify that?

A. Yes, sir.

Q. The body of it is in your handwriting?

A. Yes, sir.

Q. And whose is the signature?

A. Dr. Lincoln's.

The paper thus identified is marked for identification, "Defendant's Exhibit B."

RUFUS P. LINCOLN, being duly sworn and examined as a witness for the plaintiff, testifies:

BY MR. BROWN: Q. You are the plaintiff in this action?
A. I am; yes, sir.
Q. What is your profession?
A. Physician.
Q. Where do you reside, and where is your office?
A. 22 West Thirty-first street, in this city.
Q. And how long have you been in practice in this city?
A. Since 1868.
Q. Do you know the defendant, Mr. Hinchman?
A. Yes.
Q. Did you, on or about the 7th of July, have any conversation with him in reference to what have been called the Bothwell securities?
A. I did.
Q. Had you previously on the same day had any interview with Mr. Tyler?
A. I had.
Q. Subsequent to your interview with Mr. Tyler and when you saw Mr. Hinchman, what occurred between you and Mr. Hinchman?
A. I was present at a meeting of the Hite Company at 2 Nassau street, on that day, the 7th of July, when Mr. Tyler came in and told me that Mr. Hinchman was in the adjoining room and that he had had some conversation with him about buying my rights in what were called the Stormont——

MR. FULLERTON: One moment. I object.

Q. I do not call for your interview with Mr. Tyler.
A. After the adjournment of the meeting referred to—that is, on the 7th of July, Mr. Hinchman came in the room. I think he came in just as the meeting was adjourned, and sat down for a moment after the adjournment of the meeting. The gentle-

men were dispersing. Perhaps there were fifteen people in all. And Mr. Hinchman came to me, and I spoke to him and passed the compliments of the day, and remarked to him, "I understand that you have bought the Bothwell securities" he knowing about their disposition which was referred to. He said, "Yes;" and he seemed to be in some hurry. He was about going out, and I said that I would like to close up the transaction, as I wanted some money, and asked when he would finish the transaction. He then asked where the securities were, thinking perhaps I had them with me. I told him they were in the Safe Deposit Company, and then he said if I would come there to-morrow at three o'clock with the securities he would close the transaction. There was no further conversation. We parted at that time.

Q. Was anything said in that conversation between you and him, or in your presence, by Mr. Tyler, with reference to the price at which he had bought them? If there was, state it?

A. I don't think there was. I really can't recall.

Q. That was all the conversation that you remember?

A. That is all I remember at that time.

Q. Did you attend at his office the next day?

A. On the following day I went down town by appointment to go to Mr. Tyler's office and met him, and we went together, having the securities, to their office on Nassau street, No. 2, at three o'clock, expecting to meet Mr. Hinchman.

Q. The securities that you have called the Bothwell securities —were those mentioned in the complaint?

A. Yes.

Q. Well, what occurred at that office?

A. I met Mr. Van Rensselaer.

Q. What was done?

A. I left the securities with Mr. Van Rensselaer.

Q. And did he do anything?

A. He gave me a receipt for them.

Q. Which is the receipt in evidence?

A. The receipt in evidence, yes, sir.

Q. You have heard the testimony of Mr. Tyler upon the stand, and you have heard Mr. Tyler testify that he was directed by you to see Mr. Hinchman and to write various letters?

A. Yes, sir.

Q. You had authorized him to take charge of this matter in your behalf as your attorney?

A. Yes, sir.

Q. Did you have, subsequently to the delivery of the securities, any interview with Mr. Hinchman?

A. I met Mr. Hinchman accidentally at Long Beach on one occasion. I can't recall anything before that.

Q. About what time was that?

A. That was, I think, the 1st of August.

Q. That is the interview that he refers to in one of the letters that has been read in evidence?

A. That was the interview that he refers to.

Q. Will you state all that occurred at that interview between you and Mr. Hinchman, and who was present?

A. I, as I say, met Mr. Hinchman accidentally there—not by appointment or anything of that kind; and one evening after dinner he and his friend, Mr. Meyer, were present, and as soon as I saw Mr. Meyer——

Q. His counsel in this case?

A. Yes, sir. (Continuing.) I spoke to him. I do not know that he recognized me, for I was not well acquainted with him before, and he introduced me to Mr. Meyer, and he said, "This is Dr. Lincoln, from whom I have the Bothwell securities," and we had some conversation about it, but nothing very definite, although there came up during the conversation a statement that there was some controversy about it. I don't know whether I made the statement or Mr. Meyer or Mr. Hinchman. I remarked that there might be some difference—had heard something about some difference of opinion about it, but that I had none; and I told Mr. Meyer that the idea of turning them over to the Stormont Company was an afterthought of Mr. Hinchman; that I conceded nothing of the kind. I never had.

Q. Do you remember what Mr. Hinchman said?

A. I don't think anything—nothing definite, certainly, on that subject; he referred to his business down there and things of that kind.

Q. Do you recall any other portions of the conversation, or have you given all that you now remember?

A. Yes, sir, all that I think refers to this subject.

CROSS-EXAMINED BY MR. FULLERTON:

Q. In detailing what took place at Long Beach between yourself and Mr. Hinchman, you used this language: "This is Mr. Lincoln, from whom I have the Bothwell securities," you used that exact language?

A. I think it is the exact language; it is the substance of it at any rate.

Q. That is the substance of it?

A. I think it is.

Q. Can you say that the language used was not this: "This is Mr. Lincoln with whom I have had a difficulty about the Bothwell securities?"

A. No, sir. That was the way I was introduced—as I have stated; he may have stated that afterwards.

Q. One moment. I am asking whether this was the language which I have given?

A. No, sir, it was not.

Q. Are you sure that you have given us the exact words that were used?

A. I stated that I thought that those were the exact words; at any rate that was the substance.

Q. You do not pretend to say that you have given it in exact words?

A. I say I think it was the exact words.

Q. But you are not positive that they were, are you?

A. If you will read them again I think perhaps I can recall them.

Q. Must I read them again?

A. Read them, if you please, sir, as you then asked me.

Q. Will you say that in giving your evidence you employed the exact words that were used upon that occasion?

A. I only stated that I believed those were the exact words.

Q. I ask you if you can swear positively to them?

A. Mr. Hinchman said: "This is Dr. Lincoln, from whom I have the Bothwell securities;" I am positive about that.

Q. You are confident?

A. Yes, sir.

Q. You make no mistake about the very words?

A. Yes, sir.

Q. And they were used how many years ago?

A. That was in 1882.

Q. In the year 1882?

A. In the year 1882, in the summer.

Q. Did you have any occasion to make any memorandum of them?

A. Yes, sir.

Q. Where is the memorandum?

A. I haven't it here, but I think I could produce it; I began to be suspicious of people and I made some notes.

MR. FULLERTON: Q. If you made a memorandum of that conversation I want you to produce it, if you can?

A. Yes, sir; I think I have it in my memorandum at home.

Q. You haven't it here?

A. No, sir.

Q. Will you now repeat the very words that were used in the introduction?

A. Yes, sir.

Q. Well, what were they?

A. "This is Dr. Lincoln, from whom I have the Bothwell securities."

Q. Now you are positive of it?

A. I have stated my positiveness several times.

MR. BROWN: Now, if your Honor please, I will put in evidence a fact under stipulation between counsel with reference to this answer of Mr. Van Rensselaer to the demand made upon him for these securities. The stipulation is:

"U. S. CIRCUIT COURT.

"RUFUS P. LINCOLN

AGAINST

"CHARLES S. HINCHMAN.

"It is hereby stipulated and agreed that if Schuyler Van "Rensselaer, who is represented to be now confined at home "with illness, were examined as a witness in this case, he "would testify that the annexed letter was written and sent to

" plaintiff by Nash & Kingsford on his behalf and by his " direction, and would testify that the facts therein " stated are true.

" Dated New York, February 5th, 1884.

" THEODORE F. H. MEYER,
" Atty. for Defendant,

" BEACH & BROWN,
" Plaintiff's Attys.

" NASH & KINGSFORD,
" Counsellors-at-Law,
" 51 William St.,
" NEW YORK, Nov. 20, 1882.

" DR. R. P. LINCOLN:

" SIR—In answer to the demand made upon me through Mr. " M. W. Tyler, I beg to say that I hold the securities mentioned " therein on behalf of yourself and Mr. C. S. Hinchman, and I " have no interest in or claim upon them personally. I have " been notified by Mr. Hinchman not to deliver them to you, " and for that reason shall not be able to accede to your " demand.

" Any arrangement agreed to by yourself and Mr. Hinchman " shall have my prompt acquiescence.

" I am, &c.,
" S. VAN RENSSELAER,
" per
" NASH & KINGSFORD,
" His Attys."

And I put in evidence this fact: " In answer to the demand " made upon me through Mr. M. W. Tyler, I beg to say that I " have been notified * * * by Mr. Hinchman not to deliver " them to you; and for that reason will not accede to your " demand."

Plaintiff's counsel here again read Plaintiff's Exhibit No. 16.

MR. FULLERTON: I now put in the balance.

MR. BROWN: I object to the balance of it as immaterial, irrelevant, incompetent and as a conclusion of law which the witness can't swear to.

Objection sustained. Defendant excepts.

PLAINTIFF RESTS.

Defendant's counsel moves that the Court direct a verdict in favor of the defendant, upon the ground that the plaintiffs have failed to make out a legal contract for the purchase of these securities.

Plaintiff's counsel opposes the motion.

THE COURT: My impression now is that the question whether or not there was a valid contract, and as a corollary to that proposition, whether or not these securities were delivered to this defendant pursuant to the provisions ot that contract, is by the proof, as it now stands, a question of fact and not of law, and should be determined by the jury; therefore the motion to direct a verdict is denied.

Defendant excepts.

MR. FULLERTON opens the case for the defendant.

CHARLES S. HINCHMAN, being duly affirmed and examined as a witness for the defendant, testifies:

BY MR. FULLERTON: Q. Where do you reside?

A. I reside in Burlington, New Jersey, or did at the time this action was commenced. I am at present in the winter in Philadelphia; have been this winter.

Q. Have you been engaged in business in Philadelphia?

A. Yes, sir; for the last fifteen years.

Q. What connection had you with the Stormont Mining Company?

A. I was a stockholder, sir, originally, and made a trustee.

Q. When did you become a stockholder?

A. I became a stockholder at the time Mr. E. C. Knight, and Thomas Cochran and Oliver Johnson bought the company. I can't give the exact date.

Q. Give me your best recollection of it?

A. In 1881, sir.

Q. About 1881?

A. That is my recollection.

Q. And when did you become trustee?

A. Soon after, sir.

Q. When did the pecuniary difficulty with the Stormont Company arise?

A. I first heard of it, sir, about the first of May.

Q. What year?

A. The end of April or first of May, 1882. It had occurred before.

Q. Were you a stockholder and trustee at that time?

A. Yes, sir.

Q. Now you may state whether you had any individual claim against Mr. Bothwell.

A. None whatever, sir.

Q. He did not owe you personally?

A. No, sir; never had any individual transactions with him.

Q. You may state whether the Stormont Company had any claim against him.

A. Yes, sir; it had.

Q. To what extent?

A. To about $76,000.

Q. And how did that arise; state briefly?

A. It arose from their misappropriating the bullion.

Q. "Their?"

A. From Clark & Bothwell taking over to their personal accounts and advancing it to the Hite Mine or Hite Company. A portion of it we traced to that company—a large portion; the proceeds of about $76,000 in bullion, remitted through Wells, Fargo & Co. to them as agents of the company.

Q. You may now state what relation Mr. Bothwell sustained towards the Stormont Company?

A. Mr. Bothwell was its treasurer; Professor William S. Clarke, of Amherst, was its president.

Q. What relation did Mr. Bothwell sustain towards the Hite Company?

A. He was also treasurer of both companies. Understand, I was not interested in the Hite Company.

Q. And do you mean to be understood that his possession of this bullion, that was transferred to the Hite Company, was as treasurer of the Stormont Company?

A. Yes, sir.

Q. It has been proved here that you went down to Wells, Fargo & Co. with Mr. Tyler, representing Mr. Lincoln, and that you received a check for $15,000; you recollect that, do you?

A. Not there, sir; I went down with Mr. Tyler to a broker's office.

Q. To a broker's office?

A. Yes, sir.

Q. And you received a check?

A. I received a check for $15,000 there.

Q. And that was to reimburse you for what you had paid out?

A. For advances and expenses.

Q. For whom had you been acting in paying out that $15,000?

Objected to. Objection sustained. Defendant excepts.

Q. Did you intend to advance this $15,000 with a view of obtaining the title to the securities for the use, or for the purpose of aiding the Stormont Company, and acting in their behalf?

Objected to. Objection sustained. Defendant excepts.

Q. I now come up to the 7th or 8th of July. Do you recollect a conversation between yourself and Mr. Tyler with regard to the purchase of these securities?

A. I recollect a number of conversations with him, sir.

Q. Now you may state what occurred between you and him with regard to that stock purchased by you, or those securities?

A. I was requested by the officers of the Hite Company, including Mr. Bothwell, to come over to New York—

Q. Do you mean, by saying that you were requested by the directors of the Hite Company, including Mr. Tyler, that Mr. Tyler requested you?

A. Yes, sir; he was one of them.

Q. What did you say to Mr. Tyler and what did you do?

A. We had many talks, in several of which Mr. Tyler had notified me that as trustee I could act in no other capacity than for the Stormont Company, and on the date of the Hite meeting I was there to give these gentlemen—Dr. Lincoln included, presiding—an account of the Hite Mine as I found it, and to ar-

range with them, if possible, on behalf of the Stormont Company, a general settlement.

Q. What took place at that meeting?

A. There was much talk between gentlemen at the meeting as to the best means of raising the money to make a settlement with the Stormont Company and about its claims.

They, without admitting its claim directly, admitted there was a claim, but they would not admit the amount of it.

MR. BROWN: I object to that, "They admitted that there was a claim," and they admitted this and that. Let him state what was said and let us judge whether they "admitted" or not.

BY THE COURT: Won't you please state who it was that spoke, and what was said, as near as you can; if you can't recollect the language, state the substance of it.

A. Mr. Tyler made a suggestion that the Hite Company should issue bonds which the Stormont should receive.

Q. Should receive what?

A. Should receive part of its claim in bonds and part in cash, to be realized by the Hite stockholders taking the bonds themselves. While I was writing I was standing at the transfer clerk's desk, having retired to allow the gentlemen to consult among themselves. Mr. Tyler came to me and remarked that Dr. Lincoln would like to sell his stock; I said he could not sell it without the consent of the Stormont trustees. He then said Dr. Lincoln would like to sell his position, and that he claimed $26,000 advance on those stocks. I asked what could be got out of them; he made some figures; I made some figures and said that there was not that in them. He then said that he was authorized to sell them for $21,000. I told him that there was not that in them, as I could not figure that in them, but I thought I could fix it for him at $18,000. He then, after some desultory conversation, went in the other room, came back after a while, just before the meeting broke up, and said that Dr. Lincoln would sell at that and wanted to know when he could make an appointment for closing the negotiation with the Doctor. I told him I would endeavor to meet the Doctor and him at his (Mr. Tyler's) office as suggested.

Q. When?

A. The next day. And asked him how they were getting on in the Hite meeting. No conclusion had been arrived at then, but they had not then adjourned. He went back to the Hite meeting and I, after a while, finished what I was at and the Hite meeting broke up. I bid the several gentlemen good day. I went around to my office, or my brother's office rather, at 47 William street, the London, Liverpool and Globe building, to consult my co-trustee, Mr. Meyer, to know in what shape we could put the purchase of the stock, how we could arrange about it, he being familiar with what had been going on between the companies. He was not in, and I found that I could not see the majority of our trustees and so wrote Mr. Tyler a letter.

Q. The one that has been introduced here?

A. I think so, sir, although I have not seen it from that day to this; I have no copy of it.

Q. You wrote him a note at all events?

A. I wrote him a note.

Q. Explaining why you could not meet him?

A. Yes, sir. Explaining why I could not meet him.

Q. Go on?

A. And I then returned to Philadelphia and laid the whole matter before my co-trustee Mr. Cochran.

Mr. Brown moved to strike out the last answer. Defendant's counsel objects.

THE COURT: It is admitted not as testimony of what took place, but as evidence of an act, that is, that he went to Philadelphia and saw the trustee.

Q. When did you return to New York again after laying the matter before your co-trustee?

A. Not for some days; I think a week or more.

Q. By the way, do you mean to be understood that Mr. Cochran was a trustee of the Stormont Company?

A. Yes, sir; an active trustee, largely interested.

Q. You returned to New York in about what time; two weeks?

A. Inside of two weeks.

Q. What was the condition of the Stormont Company at that time?

Objected to, first as immaterial; second that the records of the company are the best evidence of the condition of

the company; third, the evidence that he proposes to give now, as stated by counsel, is diametrically opposed to the proposition he advanced yesterday and put in his opening, that this deposit was a deposit for the joint account of this plaintiff and the Stormont Company. Objection sustained. Defendant excepts.

Q. Had the Stormont Company been sold out at that time?

Objected to on the grounds that the records of the company will show. Objection sustained. Defendant excepts.

Q. You may state whether there was any plan on foot for the reorganization of the Stormont Company?

Objected to as immaterial. Objection sustained. Defendant excepts.

Q. Was there any plan on foot for the reorganization of the Stormont Company in which Dr. Lincoln, the plaintiff, and his attorney participated?

A. Yes, sir; there was.

Q. What was that plan of reorganization?

A. That plan was matured in Mr. Tyler's office, that two trustees should be sent to Utah.

By Mr. Brown: Q. Was that plan in writing?

A. A circular was written up.

By Mr. Fullerton: Q. I am not asking about that. The circulars followed.

A. Yes, sir; that plan was not in writing, sir, but a circular was issued based on it.

Q. What was the plan that was talked of?

A. The plan that was talked of, was to endeavor to save from the wreck what could bo saved for the stockholders of the Stormont and other companies.

Mr. Brown: I move to strike that out.

The Court: It may be stricken out; and Mr. Hinchman please be good enough to state what was said and who said it.

A. Mr. Tyler made an arrangement.

Q. What did he say?

A. He said if we would come to his office at a certain time set, about the 3d of May, 1882, he would have John R. Bothwell there. Dr. Lincoln was also there a part of the time, and Mr. M. F. Dickinson also, the brother-in-law of the president, and representing certain stock.

Q. Was he a trustee?

A. I am not sure that he was at that time, but he was made so.

Q. Will you tell us what the plan was when you got together?

Objected to.

Q. What was said, if anything was said, about the reorganization of the Stormont Company; tell us what it was as well as you can. I know it is very difficult in a stormy meeting of trustees, where there was nothing regularly done and where all talked together, but give us the substance of the conversation, and by whom it was had, the best you can?

A. At Mr. Tyler's suggestion, Mr. Bothwell's resignation was written out. At the meeting held in his office Mr. Van Rensselaer was elected secretary and treasurer in Bothwell's place. I believe I was elected president at that meeting. No, sir, we had not the resignation of the president then.

Q. Come to the reorganization as soon as you can, what was said?

A. At that meeting it was suggested that Mr. Van Rensselaer and myself should go to the mine. It was then announed that the mine was about to be sold. The mine and mill of the company were to be sold on the 16th and 17th days of May by the United States Marshal for the debts, supposed to aggregate about $47,000.

By MR. BROWN: Q. Do you mean to be understood as giving a detailed statement of the transactions of that meeting that you have given, at which Mr. Tyler or Dr. Lincoln was present?

A. I mean to say that at the informal meeting at Mr. Tyler's office, Mr. Tyler was in and out.

Q. Do you mean to be understood as saying that Mr. Tyler and Dr. Lincoln were in at that last conversation, that he had

just detailed, where he said that it was suggested that you should go to the West?

A. I can make it plainer perhaps.

BY THE COURT: Q. Are you speaking of the same meeting?

A. I am speaking of the same general meeting at Mr. Tyler's office, to the best of my memory and recollection. I took no notes of it. We had many meetings at that time, most of them informal. Mr. Tyler was apparently acting as the friend, professing to be the friend of all the companies.

BY MR. FULLERTON: Q. I will put this question; did anything occur in the presence of Mr. Tyler or Mr. Lincoln in regard to the reorganization of the Stormont Company; and if so, what was it?

A. The plan for two of the trustees going West to examine the property and save it, if possible, from sale, was matured partly in Mr. Tyler's office and partly in the office of the company at 2 Nassau street. The meetings were then all informal, everybody was excited and came in, nearly all asking for details, and Mr. Bothwell was apparently—

Q. Was there a reorganization of that company?

A. Yes, sir; there was one finally made, sir.

Q. Was there an attempt?

A. Yes, sir; there was an attempt once.

Q. What part did Mr. Lincoln or Mr. Tyler take in that reorganization; that is what I want to know?

A. Well, sir, the reorganization could not take place until after the sale of the property, until after this purchase, there was no reorganization at that meeting.

Q. What was said about a reorganization at any meeting, or at any time or at any place, in which Mr. Tyler or Mr. Lincoln participated?

A. At No. 2 Nassau street, sir; the plan was discussed as explained to Mr. Tyler.

Q. By whom?

A. By me.

Q. What did you say to him?

A. It seemed to meet with his approval, the plan being formulated in the circular signed by all the trustees.

Q. What was the plan, Mr. Hinchman?

A. I beg pardon.

Q. What was the plan?

A. The plan was the old stockholders should be allowed to exchange their stock in the new company share for share and pay an assessment of twenty-five cents for each share exchanged, and should receive a new share for each twenty-five cents paid in.

Q. Was that talk between you and Mr. Tyler, or between you and Mr. Lincoln?

A. Between Mr. Tyler and myself it was.

Q. It was talked of?

A. Yes, sir.

Q. How was this stock to be exchanged?

A. It was to be exchanged through myself and Mr. Schuyler Van Rensselaer.

Q. Who was to receive it?

A. It was to be received by Mr. Van Rensselaer?

Q. What was said, at any time, in the presence either of Mr. Tyler or Dr. Lincoln, in reference to the reorganization and as to where the stock should be put?

A. After we returned from Utah, Mr. Tyler called upon me and stated that they had received a circular requesting the deposit of this disputed stock—this Bothwell stock as it was called—and asked that Dr. Lincoln's interest in the new stock should be protected, that until we should get further along in our negotiations, he should not be asked to advance any more money, the twenty-five cents a share of the contribution money required to entitle him to new stock. I told him that pending these negotiations, I would see that that was carried for him; and the plan was frequently up for discussion was well understood by Mr. Tyler.

Q. Go right on.

A. I can't instance the particular days and times of the conversations, but I can instance that during the course of it Mr. Tyler had been told by me that I would never act in any other capacity than as a trustee of Stormont affairs.

BY THE COURT: Q. Did you ever at any time have a conversation with Mr. Tyler or with Dr. Lincoln about the reorganization of the Stormont Company?

A. Yes, sir.

Q. When was it?

A. With Mr. Tyler after our return from Utah; not on the 3d of May, but after our return.

Q. Where was it?

A. It was at No. 2 Nassau street, the Stormont Company's office.

Q. Can you state what was said by either of you on that occasion?

A. Mr. Tyler called to inquire how the plan was working, and was in the habit of calling.

Q. He asked you how the plan was working?

A. Yes, how the plan was working; and was told about how many shares had been received up to that time, and was asked to deposit the Lincoln stock.

By Mr. Fullerton: Q. With whom?

A. Under the plan with Mr. Van Rensselaer.

Q. What did he say; give the substance of it?

A. The substance of it was, that he would have to consult with Dr. Lincoln before he could put it in.

Q. Put what in?

A. Put the 28,400 shares of Stormont's stock in.

Q. In where?

A. Into the new company.

Q. Go right on.

A. His chief trouble was to see how Dr. Lincoln——

Q. Did he say that that was his chief trouble; if so go on and tell what the trouble was?

A. He said that the trouble was about the payment of this money, about $7,000, the twenty-five cents a share; that Dr. Lincoln did not want to advance any more money, and he wanted, as the Stormont Company was interested—when this stock was realized, if it paid anything over what Dr. Lincoln was entitled to, he thought we ought to arrange some plan for carrying that additional stock and preserving Dr. Lincoln's rights.

Q. Go on.

A. I asked him at the same time about the prospect of the settlement with the Hite Company, and he told me that he believed that he and Dr. Lincoln had had that account examined by an expert by the name of Mr. Redfield, but that they had never filed their report; that he had no doubt of the correctness of that account.

Q. Go on and state if there is anything more of that interview?

A. And suggested that the Stormont Company should make

an offer to take a less amount, or should offer to take bonds for this claim and should aid in setting the Hite Company in condition to pay it.

Q. Well, now you have spoken of a demand and assessment of the Stormont stock; how much was it?

A. Twenty-five cents a share, for which they got an equal number of shares.

Q. What was said or done about the assessment of the Stormont stock prior to July 22d, 1882?

MR. BROWN: Q. And when was it?

A. It was after our return, sir, from the West, after Mr. Van Rensselaer and myself had returned in the latter part of June and early in July, before the 8th of July, within those two weeks.

Q. What was said?

A. I first heard of it from him, that he had an extension from Mr. Cochran. He had asked Mr. Cochran for delay on that assessment, and Mr. Cochran had consented in behalf of the Stormont that it should be delayed until our return.

Q. That is, the payment of the assessment?

A. That is, the payment of the assessment.

Q. By Dr. Lincoln?

A. By Dr. Lincoln, to protect his stock.

Q. Go on?

A. And it was after that, at one of our meetings, at No. 2 Nassau street, that Mr. Tyler made the proposition that some arrangement should be arrived at for relieving Dr. Lincoln of paying that additional $7,000, and still preserving his rights to get 28,000 shares of the Stormont stock when he did pay it, in addition to the old stock. I agreed that while matters were progressing and Mr. Tyler was using his friendly advices to get settlements between the various companies and Stormont, that we would carry that—the Stormont Company would carry that.

Q. That is, that Dr. Lincoln need not pay the assessment?

A. Need not pay the assessment pending the negotiations, and that he would be protected and get his 28,000 shares when it was paid.

Q. I read from your letter to Dr. Lincoln, marked Plaintiff's Exhibit 3, " I told Mr. Van Rensselaer that he could receive the Stormont stock held by you for joint account of yourself and Stormont, without requiring you to advance any more money, and

that I would arrange with you about it." Had you reference to the assessment on the Stormont stock and the arrangement by which Mr. Lincoln should not be called upon?

A. Yes, sir.

Q. Was that what you referred to?

Now, I will read further: "There are several questions which come up in regard to it, and I cannot give you any definite reply until I have conferred with counsel and my co-trustees on the subject." "My advice to you is to exchange the Stormont stock for receipts, as a majority have already done on receipt of this; and, if you do so, and not convenient for you to advance the contribution for additional stock, I will see that it is carried until we have an opportunity to fix up the whole matter." Had you reference in that to this negotiation of this stock?

A. Yes, sir.

Q. I call your attention to this receipt, signed by Mr. Schuyler Van Rensselaer, dated July 8th, 1882, where were you when that receipt was drawn?

A. In Philadelphia, sir, or in my bed at home in Burlington.

Q. Did you get that receipt at the time it was given?

A. No, sir.

Q. When did you first learn of it?

A. Some days afterwards.

Q. How long afterwards?

A. I think within a week, but I can find no record of it.

Q. Did you authorize Mr. Van Rensselaer to give such a receipt?

A. Never, sir.

Q. Did you ever authorize him to draw such a receipt?

A. No, sir; I never authorized him to sign such a receipt.

Q. How did you learn the contents of that receipt?

A. I was shown it by Mr. Van Rensselaer.

Q. Where were you when it was shown you?

A. In the office of the company, 2 Nassau street.

By the Court: Q. A copy of it?

A. A copy of it, in Mr. Tyler's handwriting.

By Mr. Fullerton: Q. Was the copy in Mr. Tyler's handwriting?

A. Yes, sir, I believe so. I am not an expert to say, but I believe it was.

Q. Did you ever say anything about that receipt afterwards

to Mr. Tyler or to Mr. Lincoln, and, if so, what, or about the tenor by which you held the property?

A. Yes, sir; I asked Mr. Van Rensselaer how he came to sign such a receipt.

Objected to. Objection sustained. Defendant excepts.

Q. Did you ever converse with Tyler or Lincoln in regard to it?

A. Yes, sir.

Q. What did you say to them, and when was it?

A. I had a meeting after that receipt had been given. Mr. Tyler called at the office, No. 2 Nassau street, several times and saw me there at one or more times in the month of July, after the date of that receipt.

Q. What did you say to him?

A. I told him that Mr. Van Rensselaer had no authority to give such a receipt.

Q. Can you tell at what particular meeting that was said?

A. It was a meeting in the front room of the Stormont Company's office, No. 2 Nassau street.

Q. But you can't tell the particular meeting?

A. No, sir; I can't.

Q. Nor the particular date?

A. There was no particular meeting. He came in there while I was there.

Q. The meeting between you and him, you can't state what time that took place?

A. It was in the month of July.

Q. Nor the particular time that it took place?

A. No, sir; the day I cannot fix—one of those talks—or the day before I met Dr. Lincoln at Long Beach.

Q. Now, sir, it is said that Mr. Van Rensselaer on the 20th of November, 1882, refused to deliver up this stock to Mr. Lincoln. Look at the letter which I show you and say whether it is the one that you read to Mr. Van Rensselaer in regard to this stock?

A. Yes, sir; that is the original letter.

The letter thus identified is offered in evidence by defendant's counsel.

Objected to as irrelevant, incompetent and immaterial.

MR. FULLERTON: I offer it in view of the letter of November 20th, 1882 (Plaintiff's Exhibit No. 16), written by Mr. Van Rensselaer or by his attorney to Mr. Lincoln, in answer to the demand.

Same objection. Objection overruled.

The letter referred to is marked "Defendant's Exhibit C," and is read in evidence. It is as follows:

"OFFICE OF STORMONT MINING COMPANY OF UTAH,
"No. 2 Nassau, cor. of Wall St.,
"President,
"Charles S. Hinchman.
"Secretary and Treasurer,
"Schuyler Van Rennsselaer.

"NEW YORK, Aug. 24, 1882.

"SCHUYLER VAN RENSSELAER, ESQ.,
"Sec'y and Treas. Stormont S. M. Co.,
"No. 2 Nassau St., N. Y.

"DEAR SIR—Dr. Lincoln, through his attorney, Col. M. W. "Tyler, having seen fit to disavow the understanding and agree- "ment by which he obtained 'his position' in carrying the J. "R. Bothwell securities in your hands, left there by Col. Tyler, "after conference with a majority of our trustees, I am instruct- "ed to notify you to retain possession of said securities until a "Court of competent jurisdiction shall direct you what to do with "them, I claiming as a trustee for the benefit of Stormont Treas- "ury, an equitable and *bona fide* interest therein. Please ac- "knowledge safe receipt.

"Yours truly,
"CHAS. S. HINCHMAN.
"Prest. and Trustee S. S. M. Co."

Q. What I want to ask you is this: did you ever give Mr. Van Rensselaer any instructions as regards the delivery or non-delivery of that stock, except what is contained in that letter?

A. No, sir; I never did. I never saw the stock from that day.

Q. Look at the paper I now show you, and say whether it is the circular that was issued by the company?

A. It is the circular that was issued by the majority of the trustees May 5th.

Q. And the one that is spoken of?
A. Yes, sir.

The paper thus referred to is marked for identification "Defendant's Exhibit D."

Q. I call your attention now to the testimony given on the part of the plaintiff, so far as the conversation is concerned at Long Beach, when it is said that there was an introduction and language used about it to this effect: "This is Dr. Lincoln, from whom I received the stock." Was such a conversation had there?

A. There was a meeting with Dr. Lincoln, but no such conversation as that.

Q. Did you say there, when you were introduced, "This is Dr. Lincoln, from whom I received the Bothwell stock," or was anything to that effect?

A. No, sir.

Q. Or anything to that effect?

A. No words to that effect.

Q. Did you hear the testimony of Mr. Tyler?

A. Not all of it, sir; I heard it.

Q. Did you hear it in that respect as to what was said at Long Beach?

A. No, sir; he was not present.

Q. Did you hear him testify here yesterday as to what was said at Long Beach by you?

Q. No, sir.

Q. Didn't you hear him?

A. No, sir; I did not.

Q. Did you hear the testimony of Dr. Lincoln yesterday?

A. No, sir.

MR. FULLERTON: I now offer this circular in evidence which has been marked "Defendant's Exhibit D." The circular was then read in evidence, and is as follows:

"NEW YORK, May 5th, 1882.

"DEAR SIR:—At a special informal meeting of some of the "largest holders of the Stormont Silver Mining Company, held "in New York May 3d, 1882, the undersigned were appointed

" a committee to investigate the present financial condition " of the company, and to recommend and carry out some " plan for relieving the company of its present embarrassments. " After such examination as we have been able to make, we con- " clude, report and recommend as follows: The indebtedness for " which the mine is now levied upon and advertised to be sold " May 17, 1882, amounts to about $50,000. This sum must be " raised at once to save the property. We have, therefore, con- " cluded to ask the stockholders to raise the sum of $50,000, by " contributing twenty-five cents upon each share of their " stock. These subscriptions will be payable, if the amount is " subscribed, on the 15th inst. If you are desirous of saving " your interest in this property, you will please sign and mail at " once the enclosed subscription to CHARLES S. HINCHMAN and " SCHUYLER VAN RENSSELAER, Trustees, care American Exchange " National Bank, 128 Broadway, New York, enclosing check for " amount you subscribe, which will be returned to you in event " of failure to get the $50,000 subscribed and paid in.

" It will be understood, of course, that those who do not " join in this subscription, and pay the same on or before the " 15th inst., will sacrifice their stock in the company.

" In event of purchase and further reorganization, new cer- " tificates will be issued to the subscribing stockholders in the " proportion which each subscription bears to the whole amount " subscribed. The Committee beg leave to state that this is the " only plan which seems to them practicable for saving the prop- " erty; and that more than one-third the amount has already " been subscribed. An immediate response to this circular is " absolutely necessary to the carrying out of the plan proposed.

" Committee, { THOMAS COCHRAN, 320 Chestnut street, Philadelphia. CHAS. S. HINCHMAN, 208 South Fourth street, Philadelphia. M. F. DICKINSON, JR., 14 Pemberton square, Boston. SCHUYLER VAN RENSSELAER, 2 Nassau street, New York City."

Q. In the letter which I read to you before recess, where you spoke of saving Mr. Lincoln the necessity of paying the subscription, did you refer to the subscription mentioned in that paper?

A. Yes, sir.

Defendant's counsel then read in evidence plaintiff's Exhibit No. 14.

Q. After having read that letter, I want to ask you what was said by Mr. Tyler about putting the agreement or the arrangement in writing; I refer to this part of it: "That as I was then on the eve of starting West, to save the Stormont property from passing into the creditors' hands, at yours, or other gentlemen's suggestions, I had not the time to draft the papers embodying our understanding and agreement, to be signed by Dr. L. and self; I asked you to draft and submit it on my return?"

A. At the Stormont Company's office, where Mr. Tyler called on me before we went to Dr. Lincoln's broker's office, where we went to get our check, I asked him to embody the agreement in writing, and he promised to do so, and have it ready upon our return. After submitting the suggestion to Dr. Lincoln, I was never able to get the agreement submitted after our return.

By the Court: Q. When did you go West?

A. About the 5th day of May, sir. The 5th or the 6th.

Q. When did you return?

A. About the 24th day of June. I am speaking entirely from memory as to dates.

By Mr. Fullerton: Q. I call your attention to this branch of the letter just read: "I asked you to draft and submit it on my return," referring to the agreement, and I understood you to say, before you left for the West, that Dr. L. had accepted your suggestion and agreed so to carry them; did he so tell you?

A. Yes, sir; Mr. Mason W. Tyler so told me.

Q. In whose handwriting is the lead pencil memorandum on the back of it?

A. Mine, sir.

Q. When was it put there?

A. It was put there at the time, the date of receiving the bill of sale from Wells, Fargo & Company.

Q. What date was that?

A. I think the second or third day of May, at the time the agreement was arrived at, that I referred it to Capt. Tyler—with

Mr. Tyler. That bill of sale was then turned over to Mr. Schuyler Van Rensselaer, as treasurer of the company.

Q. And that memoranda of yours was put on at the time?

A. Yes, sir.

Q. Was it put on in accordance with this agreement between you and them?

A. Yes, sir.

The paper thus identified was offered in evidence; objected to.

THE COURT: If he wishes to refresh his recollection by the memorandum made on it, he can do so. I do not think the memorandum is evidence in itself.

Q. Refresh your recollection by looking at it, and I will ask you some questions?

The witness examines paper.

Q. At the time that you received this check of $15,000, at the office of the broker, from Mr. Tyler, or from somebody else, and received that bill of sale and made that entry, tell us what the bargain was, or what the arrangement was, between you and Mr. Tyler?

A. The arrangement was substantially as Mr. Tyler testified to the day before yesterday, except in this, that the check—

Q. Tell us the arrangement; leave the check out—that has been paid; state what the party said?

A. Mr. Tyler said that he didn't desire to make any trouble if it could be arranged amicably, but that he held the bill of sale and should commence—

Q. What was the arrangement as to that contract?

A. The arrangement was that I should turn over the securities which I had notified Wells, Fargo & Co. had been held by assignment from Bothwell for the benefit of the Stormont treasurer, which notice was in writing to them. They then suggested to me that they would turn over those securities.

Plaintiff's counsel objects, and moves to strike out this testimony.

BY THE COURT: Q. What was your agreement with Mr. Tyler?

A. On the day—the agreement is here stated. I will read from this; it is as clear as I can give it.

Q. What was said?

A. Mr. Tyler said that, as the attorney of Dr. Lincoln, he would recommend, if I would turn these securities over, that Dr. Lincoln should hold them in the way we had talked over.

Q. How was that?

A. Not to be sold without the consent of the Stormont Company; to be marketed to the best advantage for the mutual interests of our concern; and after Dr. Lincoln was paid back the amount he had actually advanced upon it, with interest, and the amount that he had actually advanced on this bill of sale, with interest, the balance was first to go, if any balance, first to go to the Stormont Company, to the extent of its loss through Clark & Bothwell; next, *pro rata* to the Hite and other companies which Mr. Tyler and Dr. Lincoln were then in.

CROSS-EXAMINED BY MR. BROWN:

Q. And before you delivered those securities to Mr. Tyler on that occasion, you had not heard from Dr. Lincoln whether he had agreed to Mr. Tyler's recommendation or not?

A. I had to—

Q. Will you answer that question, yes or no?

A. If you will kindly repeat it.

BY THE COURT: Q. At the time of this conversation with Mr. Tyler, had you heard from Dr. Lincoln whether or not he would accept the proposition made in his behalf by Mr. Tyler?

MR. BROWN: The recommendation of Mr. Tyler.

A. No, sir; my memory agrees with Mr. Tyler on that point.

BY MR. BROWN: Q. Mr. Hinchman, when did you become a director of the Stormont Company?

A. Before Clark & Bothwell had anything to do with it.

Q. I am asking for a date; can you give me the date?

A. Not positively, sir, but prior—

Q. Can you give me the month?

A. No, sir; not positively.

Q. Can you give me the number of months from the first of May?

A. I became a director at the same time Mr. Cochran and Mr. E. C. Knight, of Philadelphia, did. We all went in together at the time we purchased stock; I think in 1880 or 1881. It was long antecedent to this time.

Q. Did you become a director on the same day that Mr. Dickinson became a director?

A. Do you mean of the new company or of the old?

Q. That was in the new company, on the first of May. I am asking for the Stormont Company, the original company?

A. I had been a director—my memory is that I had been a director before that time.

Q. Have you the records of the Stormont Company in Court?

A. I think they are here, sir; I think so. I have not got them, and I do not know whether they are here or not.

Q. But you think they are here?

A. I got them yesterday, sir, to have them where they could be sent for.

MR. FULLERTON: You are asked if you have those in Court; say "No."

THE WITNESS: No, sir; I have not.

BY MR. BROWN: Q. Is there, in the records of the Stormont Company, any allusion to the negotiations, as you term them, of Dr. Lincoln?

Objected to.

Q. Any reference—I don't ask for the contents of the records; I ask if there is any reference?

MR. FULLERTON: That is to be found by the record itself.

A. The record will show.

THE COURT: What is the question?

Q. I ask the question, if there is anything in the records of the Stormont Company showing any action of that company with reference to this alleged negotiation between himself and Dr. Lincoln; any reference—I do not ask for the contents?

A. I think there is.

Q. Is there any record in the books of the Stormont Company with reference to this transaction between you and Dr. Lincoln prior to the 8th day of July, 1882?

A. I don't know without reference to the writings. They were kept very loosely by the secretary.

MR. FULLERTON: Never mind the "loosely."

Q. I understand you to say that you saw this receipt that was given by Mr. Van Rensselaer within a week after it was given?

A. I think so, sir.

Q. How certain are you about it?

A. I am certain that I saw it within about ten days or two weeks. I saw it the next time that I was in New York.

Q. That you will swear to positively?

A. I think so, sir.

Q. How positive are you about it?

A. I am very positive that I saw it.

Q. Do you know it as a matter of fact, that you saw it within two weeks?

A. I saw it within the month of July, sir, which would be—

Q. That you will swear to?

A. Yes, sir.

Q. Positively?

A. Yes, sir.

Q. And that you are as certain of as you are of any testimony you have given here to-day?

A. Yes, sir.

Q. And that copy that you saw of it, was in Mr. Tyler's handwriting?

A. I think it was, sir. The copy is there, and it will speak for itself.

Q. And you saw it; it was shown to you by Mr. Van Rensselaer in the office of the company?

A. Yes, sir.

Q. And between the time you saw it and the first day or the second day of August following, when you saw the Doctor at Long Beach, you had an interview with Mr. Tyler, in which you mentioned the fact that you had seen it yourself, and pro- tested against the terms of it?

A. I think so.

Q. You are positive of that?

A. I believe so. I had an interview at No. 2 Nassau street with Mr. Tyler. I called there. It was from him that I learned where the Doctor was.

Q. Did Mr. Van Rensselaer state to you where he got the copy?

A. No, sir.

Q. Or when he got it?

A. No, sir; I am not positive that he did, but I am under the impression that he told me it was given to him at the time.

Q. Did you ever see more than one copy?

A. I would not be certain of that at this date; I may. I only remember seeing one.

By Mr. Fullerton: Q. You are not certain?

A. I am not certain.

Q. You know Mr. Van Rensselaer's handwriting?

A. Yes, sir.

Q. Will you look at the paper and state whether it is in his handwriting?

A. Yes, sir; it is.

Mr. Brown: If your Honor please, I offer in evidence a letter from Mr. Van Rensselaer to Mr. Tyler, dated the 15th of September, 1882.

Defendant's counsel here interrupted and asked leave to examine the letter, after which he stated there was no objection.

The letter was then put in evidence and marked "Plaintiff's Exhibit No. 17."

Mr. Fullerton: Is that a letter to Mr. Tyler?

Mr. Brown: Yes, sir.

Mr. Fullerton: I understood it was to the witness. I object.

Mr. Brown: I offer it for the purpose of fixing the date.

THE COURT: I think you may read it. I think it is proper on cross-examination.

MR. FULLERTON: To read the letter?

THE COURT: Yes, sir.

MR. FULLERTON: Then I except, on the ground that it is immaterial, irrelevant and not pertinent to the case.

Plaintiff's counsel then read the postscript to the paper which had been previously marked Plaintiff's Exhibit 17, as follows:

" President,
" CHARLES S. HINCHMAN.
" Secretary & Treasurer,
" SCHUYLER VAN RENSSELAER.

" OFFICE OF
" STORMONT MINING COMPANY OF UTAH,
" No. 2 Nassau, cor. of Wall St.

" NEW YORK, Sept. 15, 1882.

" M. W. TYLER, ESQ.:

" DEAR SIR: Y'r favor to hand. While you obtain Dr. Lin-
" coln's written consent, I will consult the Trustees, considering
" as I do your idea proper.

" Yours truly,
" SCHUYLER VAN RENSSELAER,
" Sect'y."

" P. S. Please send me a copy of the receipt for the stocks
" which you promised me long ago.

S. V. R."

Q. Does that refresh your recollection at all now with reference to when you saw that receipt?

A. It does in this, Mr. Brown, that during the summer I received—

Q. Wait one moment; does it refresh your recollection; you say it does?

A. It does.

Q. Now are you prepared to state what was the date when you saw that receipt?

A. I cannot say sir, when I first saw it: I—

Q. Was it before or after September 15th?

A. If I saw it before, I saw another copy, I presume; whether I have seen—

Q. You are still as positive as you were before that you did see a copy before the first of August, which you saw in Mr. Van Rensselaer's possession?

A. Well, sir. I had not credited Mr. Van Rensselaer—

Q. One moment now; that does not answer my question; are you as positive as before?

A. No, sir; I am not as positive.

Q. Then you are not as positive about the rest of your testimony that you have given here this afternoon, as you were before?

A. I think I am, sir.

Q. Then you wish to change the answer that you made a while ago that you are—

A. No, sir.

Q. And you are as positive about the fact that you saw that copy receipt before the first of August, as you were of any other statement that you have made before this jury; you wish to make that statement?

A. I didn't understand that I made that statement. I would like to hear the stenographer's notes.

Q. You don't understand that you made that statement?

A. No, sir; I don't.

Q. I understand you to say that the defalcation of Messrs. Clark & Bothwell was about $76,000?

A. Between $70,000 and $80,000, sir.

Q. And when did you first learn of that defalcation?

A. About the end of April in 1882. I think just prior to this negotiation for the Bothwell securities.

Q. Then when you heard of that defalcation, did you come on to New York?

A. Yes, sir.

Q. Was there any money in the treasury of the Stormont Company when you came on to New York?

A. None that I know of—only a trifling amount, sir—a small amount.

Q. A few cents was all the amount substantially, wasn't it?

A. I don't know what its condition was.

Q. How much money did you say; did you look at the treasurer's accounts?

A. Couldn't get at them.

Q. Bothwell was the treasurer?

A. Yes, sir.

Q. Did you look at his accounts?

A. Couldn't see his accounts.

Q. Did he tell you the condition of things?

A. Yes, sir, told me that they had abstracted $15,000.

MR. BROWN: I didn't ask you what he told you. I move to strike that out.

Q. Did he tell you that there was any money on hand?

A. Yes, sir, he told me that they had in their hands sufficient to pay everything.

MR. BROWN: I move to strike that out.

THE COURT: Strike it out.

Q. Did he tell you that there was in the treasury of the Stormont Company any money?

A. No, sir; I don't remember that anything was said by him about it. He was in a very excited state of mind.

MR. BROWN: I didn't ask you that. I move that that be stricken out.

Q. Mr. Schuyler Van Rensselaer succeeded him about the second of May, did he not, as treasurer?

A. Yes, sir.

Q. Did Mr. Schuyler Van Rensselaer receive from Bothwell any money?

A. Yes, sir.

Q. Did he have any money on hand when he took possession of the office; if so, how much?

A. I think he received a thousand dollars in cash and some securities; what the amount is I can't say from memory.

Q. A thousand dollars in cash was all?

A. No, there were some marketable securities.

Q. I am asking for cash?

A. I think that was all, sir, except some small balance at the bank.

Q. What was the small balance in the bank about?

A. It was certainly a couple of hundred dollars. My impression is it was.

Q. A couple of hundred dollars would be all the cash that there was on hand in the Treasury about the second or third of May?

A. I don't say, sir, that the thousand dollars was in the Treasury; it was received from Mr. Bothwell.

Q. Presumably, it went into the Treasury?

A. Yes, sir, it went into it.

Q. And at that time?

A. Yes, sir, on or about that time.

Q. How did you learn that there was danger of a sale of the property out West?

A. I heard it after pressing enquiries of Bothwell as to the condition; he finally broke down and pulled out the Marshal's warrant.

Q. Didn't you learn it from Mr. Dickinson?

A. Mr. Dickinson was there—first—

Q. I ask you the question; didn't you learn it from him?

A. I am not sure that I learned it first from him; we knew there was difficulty—trouble.

Q. Didn't he come on here and state to you and to other members of the trustees that he had been informed that that property was advertised for sale, and wasn't that the first information that you had that the property was advertised by the sheriff for sale, and then didn't you see Mr. Bothwell and talk with him afterwards?

A. I think it was at the same time; in the same room, at the same time.

Q. The same day?

A. The same day, my impression is.

Q. And before your interview with Bothwell?

A. My first information, I think, came by a postal from Mr. M. F. Hunt, the former Vice-President of the Stormont Company, that there was trouble, and it had better be looked into.

MR. BROWN: I didn't ask that question, and move to strike that out.

Q. I am confining my enquiries now as to the sale of that property—the advertised sale. Do you mean to say that that property was advertised for sale on a certain date, and that the information came to you by a postal?

A. No, sir; not the day fixed; that came from an exhibition of the Marshal's warrant, and an advertisement.

Q. I want to know whether you got the information that there was a threatened sale on a certain day?

A. On or about the first day of May.

Q. And that you received from Dickinson, the Secretary, at the time you talked with Mr. Bothwell.

A. Yes, sir.

Q. And from Mr. Dickinson first?

A. I think probably.

Q. Mr. Dickinson was in town here for some time about that time, wasn't he?

A. I don't know, sir; he was frequently at the Stormont office, back and forwards, and at Mr. Tyler's.

Q. And you had frequent interviews with him upon the subject of the Stormont affairs, did you not?

A. How many do you mean by frequent, sir?

Q. I am not under cross-examination, you can state the number?

A. If you say frequent, we had several but not private interviews only.

Q. I didn't ask you whether they were private interviews?

A. Several interviews; yes, sir.

Q. And you were elected president of the company at that time, were you not?

A. At that time; yes, sir.

Q. And he was elected on the second, one of the trustees, was he not—or the third?

A. About that time; I can't fix it from memory, sir.

Q. Then from the third of May down to the fall of that year or down to the time that you did terminate the old Stormont Company in any way—dissolve it—Mr. Dickinson was one of the trustees, was he not?

A. I think so, sir.

Q. Now, Mr. Dickinson was a trustee at the time that you obtained the securities from Wells, Fargo & Co., was he not?

A. I am not sure, sir; no, sir, I believe not.

Q. What day did you obtain them?

A. I got them, I think, on the second day of May, sir. I think the day before it was, but I am not sure whether it was the same day; it was about the same time that he was elected.

Q. How long did you hold them before the Doctor got them?

A. A very short time.

Q. Two or three days?

A. Not more than that before Mr. Tyler called.

Q. While they were in your hands, Mr. Dickinson became one of the trustee, did he not?

A. I am not sure, sir; it was about that time; the record will show; I have not charged my memory with it.

Q. Did you tell Mr. Dickinson that you had taken up the securities with Wells, Fargo & Co.?

A. I don't remember anything being said to Mr. Dickinson on the subject, sir; there may have been; I will not say that there was not.

Q. You will not say that there was not?

A. No, sir; and I cannot recall.

Q. You will not say that there was?

A. I will not say that there was; I can't recall.

Q. Mr. Cochran, of Philadelphia, of whom you have heard, was a large stockholder with yourself, was he not?

A. Yes, sir.

Q. How much was the capital; how many shares of capital stock was there in the Stormont?

A. Two hundred thousand shares at one dollar each.

Q. Two hundred thousand shares?

A. Yes, sir, at the time of this defalcation.

Q. How much of that two hundred thousand shares did you and Mr. Cochran——

A. What we jointly owned?

Q. Yes, jointly and severally; how much did you two gentlemen represent?

A. Between thirty and forty thousand shares each, I think.

Q. That would be eighty thousand shares altogether?

A. No, sir; it would be about seventy thousand, if there were thirty-five or thirty-six thousand each.

Q. About seventy-two thousand shares you and he represented?

A. I think so.

Q. Was he a trustee?

A. Yes, sir.

Q. He became a trustee about the same time you did?

A. I think so, the same time, I think.

Q. Did you and he have any other business interests together besides the Stormont Company?

A. We are—he is the president and one of the directors, and I am one of the directors, in the Guaranty Trust Safe Deposit Company of Philadelphia.

Q. Are there any other organizations to which you and he belong?

A. No other, sir.

By the Court: Q. What other companies were you and Mr. Cochran connected with; you may answer that?

A. Do you wish me to say how many corporations I am interested in?

By Mr. Brown: Q. What corporations or speculations—whatever you may be pleased to call them—enterprises of any kind?

The Court: Q. In which you and Mr. Cochran are both interested?

A. As directors?

Q. Any way?

A. We are stockholders in several different corporations; one or two other mining companies that have gone up the spout.

Q. Now, haven't your business relations for the last three or four years been extremely intimate, personally; Mr. Cochran's and yours?

A. No, sir.

Q. And anterior to this, 1882?

A. Not more than what is usual between—

Q. I am asking now for the fact, I am not asking the comparative fact?

A. No, sir; not extremely intimate.

Q. How intimate are they; would you say they were very intimate or somewhat intimate?

A. I would say that they were not as intimate as between Doctor Lincoln and Mr. Tyler.

Mr. Brown: I didn't ask you that; I didn't ask for a comparison; I move to strike that out.

Mr. Fullerton: Yes, strike it out.

The WITNESS: They are not as intimate as between myself nad another one of the Stormont directors.

MR. FULLERTON: I object to this.

Q. Were they intimate?

Objected to.

MR. FULLERTON: I acknowledge that they are intimate.

Q. Mr. Cochran was the gentleman that you stated that you went to Philadelphia and consulted, was he not?

A. Yes, sir.

Q. Were there any other trustees?

A. Yes, sir.

Q. Who were the other trustees?

A. My brother, Mr. Walter Hinchman; I went to consult a—

Q. Was there any other besides your brother and Mr. Cochran and yourself in Philadelphia?

A. Mr. Knight was also consulted—Mr. E. C. Knight.

Q. I am asking you whether there were any others in Philadelphia?

A. He was in Philadelphia and present at some of the talks with Mr. Cochran; he is the Vice-President of the Trust Company.

Q. Then he resides in Philadelphia?

A. He resides in Philadelphia, Chestnut, west of Sixteenth.

Q. How much stock did your brother hold at that time?

A. I think he held at that time under ten thousand shares.

Q. About ten thousand shares?

A. I think about eight thousand; he was, however, jointly interested with me, so that it is included in the prior amount named.

Q. How many trustees were there of the Stormont Company?

A. I think there were five, sir—five or seven; I can't tell.

Q. Just determine the fact; I don't care?

A. Originally there were more.

Q. If you can't recall it readily, I don't care to spend time?

A. I can't recall at the moment; it was either five or seven.

Q. Mr. Hinchman, from the time that Mr. Dickinson became connected with that company down to the time of the commencement of that action, did you ever have a word of conversation with him in reference to the alleged transaction with Dr. Lincoln?

A. Yes, sir.

Q. When was it?

A. It was at one of his calls at No. 2 Nassau street.

Q. When, as near as you can remember?

A. I think it was at one of the meetings in July.

Q. In July?

A. I think so.

Q. Before or after the 8th of July?

A. It had been spoken of in a general way.

Q. I am asking about your interview with this gentleman?

A. Yes, sir.

Q. And whether it was before or after the 8th of July?

A. I think both, sir; I think we had interviews before and after.

Q. You think you had more than one interview?

A. Yes, sir; that is, the matter came up for discussion as to the possession of the Bothwell stocks.

Q. With Mr. Dickinson?

A. With the trustees and, I think, with him.

Q. I am asking about Mr. Dickinson; he was a trustee—and separately from the other trustees, in his presence anywhere; any meeting where he was present?

A. Yes, sir.

Q. State, if you please, when that was and what was said.

A. The matter was informally discussed and Mr. Dickinson said he did not wish to mix up in it in any way because of his relations with Mr. Tyler; he didn't want to know about it.

Q. What was that?

A. That special time, sir, or after the 8th—that particular time after he knew there was a difference.

Q. Wasn't that the first time that you ever had any talk with him?

A. No, sir; the matter had been a question as to what should be done.

Q. When he was present?

A. I am not sure about that, but I think so; I think he was present.

Q. Didn't you ever tell him that you had taken up that stock or proposed to take up that stock after the opening of the Stormont Company, in any way, shape or manner, prior to the 8th of July and prior to the conversation that you have now just detailed?

A. It had been informally discussed.

Q. Answer whether you did or did not?

A. I don't remember, sir.

Q. You won't say that you did—

A. That I did or did not, I believe it was discussed.

Q. One moment. I am not asking your belief; I am asking for a fact. We are trying to get at the facts and not matters of belief?

A. All right.

Q. Whether the money that you advanced, the fifteen thousand dollars, was your own money or Mr. Cochran's money, or your brother's money; whose money was it?

A. It was paid by my check on Philadelphia.

Q. Whose money was it?

A. It was the money that the Guaranty Trust & Safe Deposit Company—

Q. I am asking you whose money it was?

A. It was the money of the Guaranty Trust & Safe Deposit Company.

Q. I don't ask you how the money was paid, in whose check it was paid. I want to know whose money paid that?

By the Court: Q. Whose money was it?

A. I went over to Philadelphia and arranged to get the money from the Trust Company, to advance it.

Q. Was it yours or anybody else's?

A. Part of it was mine and part of it was—the Trust Company agreed to cash my check for it. Part of it was my brother's. I sold securities.

By Mr. Brown: Q. Was no part of that money Mr. Cochran's or your brother's? Was no paper signed by you for it, discounted in any bank or trust company?

A. My brother may have advanced me part of it at the time, but Mr. Cochran at the time was in my debt. I was carrying for him part of his—

Q. Did Mr. Cochran endorse any paper upon which that money was raised?

A. I don't think any paper was issued for it whatever, sir, except my check.

Q. Did Mr. Cochrane have anything whatever to do with raising that money?

A. No, sir.

Q. Did he accompany you to the bank; did he do anything whatever, endorse your paper, or take any other step to aid you?

A. He didn't endorse my paper. I didn't issue any paper.

Q. Did he take any step to aid you in raising that money?

A. He may have said to me that if the balance wasn't good, if I hadn't quite that amount there, the Trust Company would take care of it. They have taken care of me to the extent of one hundred thousand dollars many a time.

Q. Mr. Cochrane was a gentleman in excellent credit in Philadelphia?

A. In fair credit, sir; he should be to be at the head of a Trust Company.

Q. Now, at the time that Mr. Tyler paid you this fifteen thousand dollars and took these securities, did you not say to Mr. Tyler that this man Bothwell had swindled you in selling the stock that you had bought?

A. I think it probable that he did; it is a fact.

Q. It was a fact?

A. Yes, it was a fact.

Q. And you thought so at the time?

A. I not only thought so then, but I still think so.

Q. It has turned out so since?

A. No, it turned out so then.

Q. So much the worse for him?

A. No, for me.

MR. BROWN: And for you too, now particularly.

Q. Didn't you say to Mr. Tyler that he had swindled you out of an enormous amount of money, and that you, having been a large loser, he was indebted to you; didn't you say to Mr. Tyler in that action that Bothwell owed you a great deal more money than he did Dr. Lincoln, or words to that effect?

A. No, sir; not in that way.

Q. Words to that effect?

A. I don't remember making such a statement.

Q. Substantially that in fact?

A. Oh, it would have been true and natural for me to have alluded to his having obtained a considerable amount of money—

Q. You don't say that you didn't say just that, or words to that effect?

A. I am willing to admit that I may have said it, but I don't remember it.

Q. You admit that you said it?

A. In words to that effect, because I would say so to-day.

Q. You have stated upon your direct-examination that the deposits with Mr. Van Rensselaer for the purpose of taking up the stock in the new company were made prior to July 8th?

A. Not all of them; most of them were.

Q. Were not receipts given by Mr. Van Rensselaer generally?

A. Not always; some were sent by mail.

Q. Were not receipts prepared by Mr. Van Rensselaer in accordance with that circular that has been put in evidence, for the purpose of being given to the stockholders who deposited their stocks for the purpose of exchange?

A. I think there were, sir.

Q. Have you a copy of one of those receipts?

A. I have not with me. I could probably get one at Philadelphia.

Q. Will you look at Exhibit No. 2, being the receipt given by Mr. Van Rensselaer to Mr. Tyler for the securities, and state to this jury whether that was one of the receipts such as Mr. Van Rensselaer gave for the stock taken in for the purpose of exchange?

A. No, sir; I don't think he gave any in that form.

Q. Dr. Lincoln had some of that stock that wasn't in this 28,400 shares, didn't he?

A. I think he had a little, but I am not sure, sir; he may have had five hundred.

Q. Didn't he have five hundred shares?

A. I don't remember, sir, the amount he had; he told me he had five hundred the other day.

Q. Don't you know that he had?

A. No, sir; I don't know it.

Q. Do you know whether he turned that in, or any stock in?

A. No, sir.

Q. Under this circular?

A. I do not.

Q. You don't know whether he paid any assessment under that circular, or not?

A. I cannot say.

Q. Or any stock that he had outside of this?

A. I cannot say.

Q. You won't say that he didn't?

A. No, sir, I will not; I think he probably did.

Q. You stated, I understood you, upon your direct-examination, that Mr. Tyler in several interviews had stated to you—had advised you that you couldn't deal with this 28,400 shares of stock except as a trustee; did I not understand you correctly in so understanding you to testify?

A. Not at several interviews.

Q. At one interview?

A. Yes, sir.

Q. He had so advised you?

A. He had advised me in respect to these Bothwell securities, that I could only hold them as a trustee; that was, I think, prior to his getting them into his possession—with notice; I was charged with notice.

Q. You have an attorney, have you not?

A. No, sir, I have not, except in this case now.

Q. When did you first advise professionally with Mr. Meyer?

A. About the time of the reorganization of this company, sir; but I couldn't——

Q. And when was that?

A. Well, I think Mr. Meyer knew about the matter first about the 2d or 3d of May, sir.

Q. Then from the 2d or 3d of May down to the present time, in these matters Mr. Meyer has been your counsel, more or less, has he not?

A. He has been one of the trustees, sir.

Q. He has advised you, more or less, as a lawyer, hasn't he, and you have followed his advice?

A. He is counsel for several companies, sir, in which I am interested.

Q. That doesn't answer my question. I ask you whether

you have been advised in these matters more or less by Mr. Meyer, and whether you have followed his advice?

A. Since this action has been commenced?

Q. Prior to the commencement of this action?

A. Only at such meetings as he attended.

Q. At those meetings then?

A. Yes, sir.

Q. And he has drafted some of the papers that have been put in evidence here in the way of letters, has he not?

A. Not one of them, so far as I know.

Q. He has suggested the contents of them?

A. No, sir; not one of them, so far as I know.

Q. And you have not consulted with him with reference to any of these letters which you wrote you yourself, either to Dr. Lincoln, Mr. Tyler or to Mr. Van Rensselaer?

A. I won't say that, sir, that I have not consulted with him in reference to that; but I think I have written them all myself without——

Q. Not in his presence?

A. Not in his presence; after I had done, I would see him and see the other trustees; I found it impossible to get meetings.

Q. I have not asked you that question?

A. I wanted to give a full and fair answer.

Q. At the interview between yourself and Mr. Tyler, on the 7th of July, I understood you to say that your statement to Mr. Tyler was, when he said that the Doctor would take eighteen thousand dollars, that you thought, or that your offer was that you thought you could fix it at eighteen thousand dollars?

A. Yes, sir.

Q. Do you mean to be understood as saying that that was was your exact language?

A. As near as I can remember, sir.

Q. You will say positively that you did not say that you would pay eighteen thousand dollars for the Bothwell securities?

A. Yes, sir; I didn't make the offer "I will pay eighteen thousand dollars," or "I will give eighteen thousand dollars," or words to that effect, as an individual.

Q. I didn't ask you as an individual; I asked you if you used that languge, or words to that effect?

A. No, sir; nor words to that effect.

Q. On the 7th of July, had the finances of the Stormont particularly improved from the 1st of May?

A. The prospects were then very bright.

Q. Had the finances improved; had they any more money in their treasury, and if so, how much did they have about?

A. I think they had in the banker's hands in Utah, about sixteen thousand dollars—fourteen or sixteen thousand dollars.

Q. In the banker's hands, in Utah?

A. Yes; the company's hands.

Q. Had they any funds here in New York?

A. Yes, sir; something, not a large amount.

Q. You said that you thought you could fix it?

A. Yes, sir.

Q. And from what source did you think you could fix it?

A. We expected at that time to get through Doctor Lincoln, Mr. Tyler and the Hite Company a large amount of money; about forty thousand dollars which their people were to take bonds for.

Q. Up to that time had the Stormont passed any resolution about purchasing these securities at all; had there been any corporate action upon the subject whatever?

A. I think there had been informally.

Q. There had been no corporate action whatever?

A. I don't know what you mean by that. If you mean had the trustees known of it, the trustees had known of it.

Q. I mean formal action?

A. I don't think there was a resolution on the subject.

Q. Have you talked with the director and trustee, Mr. Dickinson?

A. I talked with all of them except Mr. Dickinson.

Q. Did you talk with Mr. Dickinson or not upon the subject of the purchasing of these securities by the Stormont Company?

A. I don't remember what was said to Mr. Dickinson upon the subject.

Q. Do you remember that anything had been said before that time?

A. I think so, sir; I think they had been referred to.

Q. Upon what occasion had that interview been had?

A. At which interview?

Q. Yes?

A. At some of the interviews when they were talking.

Q. Have you any recollection of his being present at any of those interviews; I would be glad if you would pin yourself down to facts, and say whether you do or do not know?

A. I cannot remember distinctly, sir.

Q. You have no recollection?

A. I do remember his one time saying that he didn't want to mix up in anything.

Q. That, you say, was subsequent?

A. I think so.

Q. That is so?

A. I think so.

Q. And you made an appointment; about what time of the day was it that you had this interview on the 7th of July?

A. We were there the better part of the middle—most nearly all day; the middle of the day I think; about the middle of the day; I can't give you the hour, sir.

Q. Was it in the forenoon or afternoon when you said you thought you could fix them?

A. I think the meeting was called and extended into the afternoon.

Q. About what hour of the day was it that you said to Mr. Tyler that you thought you could fix it at eighteen thousand dollars; in the morning or afternoon?

A. I can't fix the hour; I think it was about noon.

Q. At what time of the day was it that you fixed the appointment for the next afternoon?

A. I think it was fixed for three o'clock next day.

Q. About what time was it that you made the appointment on the 7th to meet the next afternoon?

A. It was about the same time; there was no great interval; I think it was between——

Q. And what hour was it that you saw Doctor Lincoln on the 7th?

A. At the breaking up of the Hite meeting.

Q. That was about three or four o'clock in the afternoon?

A. I can't tell when from memory; I endeavored always to make the four o'clock train.

Q. As I understood you to state, it ran into the afternoon?

A. I think it did.

Q. About what hour?

A. Any hour after twelve is afternoon to me; I don't know what you call it.

Q. Can you give me any idea about the time when you said to Doctor Lincoln that you would meet him the next afternoon?

A. No, sir; I don't think I said I would meet him, but that I would endeavor to.

Q. You stated on your direct examination that you made an appointment with Doctor Lincoln for the next afternoon, quoting your language, "for closing negotiations?"

A. Yes, sir, that is it exactly. It was with Mr. Tyler for Doctor Lincoln. It was not direct.

Q. And you can't give me about the hour when that occurred. You think it was the afternoon of the 7th?

A. I think it was, sir.

Q. Where did you expect to get the money to close that negotiation the next afternoon?

A. I didn't get the money to close it. I didn't expect to get the money. I expected to arrange terms. We expected to get it from the Hite Company, but not the next afternoon.

Q. You expected to close the negotiation?

A. Close the negotiation the next afternoon.

Q. Without the money?

A. Yes, sir; with a small payment. That I would make a payment on account after I closed it.

Q. Where did you expect to get any money to make a payment on account?

A. I had a little credit in New York, and I had a little credit in Philadelphia, and a bank account.

Q. You expected to pay it yourself?

A. Not unless an arrangement was arrived at which stated the equities.

Q. When an arrangement was arrived at you expected to pay it yourself?

A. I expected not to pay it, but to advance the money.

Q. You expected to advance the money?

A. Or my brother.

Q. Or Mr. Cochran?

A. Some one of them; yes, sir. We all stood together in the matter.

Q. And you didn't expect to get the money from the Hite Company then?

A. Not the next day.

Q. And you didn't expect to get the sixteen thousand dollars from Dr. Lincoln the next afternoon?

A. No, sir.

Q. Now, is it not a fact that during the whole spring or summer of 1882, and until the latter part of July, the Stormont Company and yourself, as one of the trustees, was relying upon a judgment which had been obtained against the Hite Company out West, for the obtaining of the money?

A. That was only one source, sir.

Q. Weren't you relying upon that judgment?

A. No, sir; not alone; we were relying upon that partly.

Q. I didn't ask you that?

A. No, we were relying more upon the Hite Company here.

Q. How much was that judgment for?

A. My memory is that it was for ten thousand dollars less than seventy-two thousand dollars, which was somewhere in the neighborhood of sixty thousand dollars; it was sixty odd thousand dollars, my memory is.

Q. Sixty odd thousand dollars you had a judgment for; that was a pretty large part of your claim against the Hite Company?

A. It was all but ten or fifteen thousand dollars.

Q. Then what you denominated a part of 'your claim was seven-eighths?

A. No, sir; we didn't expect to get it all in cash.

Q. I have not asked you anything about cash. If you would confine yourself to my questions in your answers, there will be no difficulty. You were relying for seven-eighths of this upon this judgment?

A. I never made the calculation dividing it into eighths, sir; I cannot tell you, sir. That was simply one of the sources of income.

Q. You stated a little while ago that you were relying upon it?

A. In part upon it, yes, sir; but I never figured out the part.

Q. Seven-eighths of the indebtedness was represented by this judgment?

A. Seven-eighths of the indebtedness of the Hite Company, you mean?

Q. Yes?

A. I think it was about that, sir; it was sixty odd thousand dollars—the amount shown in California.

Q. That judgment was set aside, was it not?

A. I don't know what the legal term is, sir; it was opened *ex parte*.

Q. It was opened after that or something was done with it which rubbed out that judgment?

A. Not entirely; it was opened *ex parte*, appealed from; negotiations were still pending here with the Hite trustees for settlement.

Q. Didn't the negotiations with the Hite trustees for a settlement of the claim begin when that judgment was opened or set aside?

A. They had begun before that.

Q. How long before that?

A. From the first day we knew of the difficulty.

Q. When did you go West?

A. About the fifth day of May.

Q. You knew of the defalcation?

A. Yes, sir.

Q. About the first of May?

A. About that; yes, sir—No, in the latter part of April.

Q. That was at the time that you first heard that the Hite Company owed anything, wasn't it?

A. Yes, sir.

Q. Then the negotiations, you say, commenced before you went away, when you first heard of it?

A. Practically; but nothing was done; it was chaotic; nothing arrived at prior to our return.

Q. You said that you wrote a note on the 7th of July, or on the 8th of July, to Mr. Tyler, explaining why you did not attend on the afternoon of the 8th?

A. No; not explaining why; but postponing it, I think.

Q. Or postponing it; you wrote him a note?

A. I think so.

Q. How positive are you?

A. I am very positive.

Q. Did you keep a copy?

A. No, sir.

Q. What sort of note was it; what was the shape?

A. I think it was on a half sheet of paper; I wrote it in the Stormont Company's office, on the desk next to the door.

Q. How did you send it?

A. I think I told them to send it—it probably went by a messenger boy.

Q. You don't know yourself?

A. No, sir; it may have gone by mail.

Q. Do you remember what you said in that letter?

A. No, sir; only in a general way; it was a postponement of that negotiation, telling him that I couldn't see him that afternoon.

Q. Did you receive any reply to that—any written reply?

MR. FULLERTON: It is proper that I should call upon the counsel for the other side for the note. The note was addressed to them.

MR. BROWN: I will just state that we hadn't any, and never received any; and, therefore, never wrote any reply.

THE WITNESS: I think it is referred to in one of Mr. Tyler's letters to me.

Q Did you receive any reply to any such note?

A. I can't say that I received a direct reply to that note, from memory; but I am very certain that I wrote such a note.

Q. I understand you to say that in the interview that you had with Mr. Tyler, immediately upon your return from the West, Mr. Tyler stated to you that they had received a circular, calling upon them to hand in this stock—that was the Bothwell securities?

A. He acknowledged receipt of it.

Q. Did he say that?

A. Words to that effect; I can't say those were the exact words he used.

Q. It is pretty important; that is the reason I asked the question. You stated (I am quoting your language) that he stated to you "that they had received a circular, calling upon them to hand in that Stormont stock." I want to know if I understand you as saying that that was what Mr. Tyler stated to you?

A. Do you mean to say referring to that stock identically?

Q. I mean just what I asked by my question? (Question repeated.)

A. He acknowledged to me that he had.

Q. Is that what he stated to you?

A. In substance.

Q. You will not state that it was actually what he said?

A. Yes, sir. I will state that the substance was that they had received a circular.

Q. I didn't ask for the substance; I asked if that was what he stated to you, that they had received a circular calling upon them to hand in the Stormont stock that was among the Bothwell securities?

A. I didn't suppose the circular was different from all the others that was sent.

Q. I didn't ask you as to the form of the circular; was that what Mr. Tyler said?

A. Yes, sir, and asked for time and the preservation of Dr. Lincoln's rights.

Q. I don't ask whether he asked for time; I asked whether that was what he said?

A. In substance, it was; I can't recall the exact words.

Q. I didn't ask you in substance; I asked whether that was what he said?

A. That was what he said, or words to that effect.

Q. That is all you will say now?

A. No, sir.

Q. That is all you will say about the question I asked, whether that was or was not the language he used. Will you say it was that, or that in substance?

A. Yes, sir.

Q. (Handing witness Exhibit C.) Will you look at this letter which Judge Fullerton put in evidence, written to you by Mr. Van Rensselaer, August 24th, 1882, and state why you wrote that letter?

A. I wrote that letter because I was advised that Dr. Lincoln or Mr. Tyler would probably put the securities out of their hands, and I wished to have it recorded—

Q. Who advised you?

A. I think Mr. Meyer knew. I think Mr. Meyer was consulted probably before that letter was written.

Q. Mr. Meyer was?

A. Yes, sir; he was one of the trustees.

Q. He advised you to write this letter?

A. I won't say he "advised" me.

Q. Will you say he did not?

A. No; I think I wrote that letter and took it around and showed it to him, and asked him if there was anything wrong in it.

Q. I asked you why you wrote that letter; you stated a very good reason at first, now you take that back?

A. That was one of the reasons.

Q. You say you were advised that the securities would be put out of their hands?

A. I said I understood they would.

Q. You said you were advised; I asked you who advised you; you said Mr. Meyer; do you wish to take that back?

A. Mr. Van Rensselaer advised me, too.

Q. Do you wish to take back the proposition that you made that Mr. Meyer advised you?

A. No sir; I do not wish to take it back.

Q. Then you have no doubt that Mr. Meyer did advise you?

A. No, sir; but Mr. Van Rensselaer did also, and Mr. Cochran.

Q. I didn't ask you that?

A. All three advised me.

Q. You wrote a letter and showed it to Mr. Meyer, and he approved it, I understand you to say?

A. I think so, sir.

Q. And then you sent it?

A. I think so.

Q. And at that date, the 24th of August, 1882, no demand had been made by Mr. Van Rensselaer for the return of that stock to Doctor Lincoln, had there?

A. I don't know.

Q. You hadn't heard of any?

A. I was not his guardian.

Q. You hadn't heard of any, had you?

A. I won't be sure whether there had been some verbal—

Q. You won't say that you had heard that there was?

A. No, I will not; I was sick a good part of that summer, sir, and at the sea-shore.

Q. Who prepared this circular originally which Mr. Fullerton put in evidence, and which is marked Exhibit D, dated May 5th?

A. It was prepared originally, I think, by my brother, after conference with Mr. Van Rensselaer and the American Exchange National Bank, to see if they would act in our business.

Q. Didn't Mr. Dickinson prepare that draft too, in his own handwriting?

A. I think he had something to do with it; I think I remember that.

Q. Did he draft it and present it to you and your brother, and the other trustees, before either you or your brother had any idea of taking such a course; wasn't the proposition his?

A. I won't say, sir, about that; there were various propositions; it was all in a turmoil, the discussion of it.

Q. Wasn't the plan in this scheme suggested by Mr. Dickinson?

A. I think Mr. Dickinson is entitled to as much credit as my brother, and I think my brother is entitled to as much credit as him.

Q. You would say half and half?

A. I should say half and half, that I am not entitled to any; it was simply submitted to me and I approved of it.

Q. And though this circular was dated on May 5th, 1882, and signed by Mr. Dickinson, you didn't state to Mr. Dickinson upon that date, or any date subsequently down to July 7th, that you had taken up or proposed to take up the Bothwell securities from Wells, Fargo & Company, or buy them from Doctor Lincoln for the benefit of the Stormont Company; is that the fact?

A. It was impossible to state it to Mr. Dickinson.

THE COURT: Answer yes or no.

THE WITNESS: Between those dates, no.

Q. Wasn't there another circular between those dates prepared by Mr. Dickinson?

A. I don't know who prepared it, sir; it was prepared in our business; I think Mr. Dickinson may have done so, and put our name to it.

Q. Weren't you there at the time?

A. I am under the impression that Mr. Cochran and Mr. Dickinson had more hand in it, but that is all I know about it.

Q. Didn't you sign it yourself?

A. I signed it afterwards, after it was printed.

Q. You approved of it?

A. I have no doubt I did; I could not do anything else.

Q. That is Meyer's too, isn't it?

A. That is too; I think that is Meyer's; that is approved by all.

The circular thus identified is put in evidence and marked Plaintiff's Exhibit No. 18, and is as follows:

"NEW YORK, July 1st, 1882.

"TO THE STOCKHOLDERS OF THE STORMONT SILVER MINING COMPANY:

"GENTLEMEN—Early in May last it was discovered by the "trustees that all of the real and personal property of the company in Utah was under attachment and was to be sold at "public auction at the mine and at St. George's in Southern Utah, "on the 16th and 17th of that month.

"It appeared on investigation, that the earnings of the mine "for a number of months, had been misappropriated in New "York, while the debts in Utah had been allowed to accumulate to the extent, as was then represented, of some $50,000.

"A committee of two of the trustees was sent at once to the "mine.

"(The previous circular of May 5th, is referred to as explaining the plan we then had in mind).

"Upon reaching Salt Lake City the committee discovered "that the claims upon the property amounted to about $71,000, "according to the statement of Colonel W. I. Allen, the efficient "and valued superintendent of the company. After such examination as they were able to give to the property, in the "brief time allowed before the sale, they deemed it wise to buy "up the judgments and lien claims, and accordingly advanced "the sum necessary for that purpose.

"This action was necessary because under the laws of Utah "no part of the personal property sold, no matter at how low a "figure, would have been subject to redemption, and the personalty absolutely controlled the operation of the mines.

"Within the period allowed for the redemption of the realty "under the laws of that territory, if the purchase had been

" made by hostile parties the mine could have been " loaded with such indebtedness as would have made it " entirely impracticable to have saved the property to the " stockholders.

" The committee's visit to Silver Reef showed them that the " Stormont mill was in good order and capable of handling all " the ore likely to be mined. Here it is seen how important it " was for the company to save the personalty, as there was a " large quantity of tools, materials and supplies on hand, which " could only have been replaced with great cost.

" With the superintendent, Colonel W. I. Allen, the committee went entirely through the mines now being worked. They " found them well developed, showing skill and practical ability " on the part of the superintendent, who is entitled to the " thanks of all the stockholders for his efficiency and faithfulness.

" The ore in sight showed well, and indicated the property " to be valuable.

" The committee visited the other mines and mills in that " camp, to be able to form a just opinion of the Stormont, and " came to the conclusion that it was the part of prudence to buy " in the property, and that with good practical management it " could be made to pay a fair return, and when some improvements were established, such as a tramway, to save the expense of a five-mile wagon haul of the ore from the mine to " the mill, the profits might be considerably increased.

" Having secured the mine, they ordered Colonel Allen to " continue working it to the best advantage of all concerned, " using the personal property as before. In this way they expect that by the date of the expiration of the period of redemption, July 22d, the indebtedness will be decreased to about " $50,000.

" We find the firm of Clark & Bothwell indebted to the Stormont Company for moneys misappropriated to the sum of " about $75,000. Owing to the absence of the firm's books it is " impossible to get at the absolute figures.

" The probability of realizing any such sum from the assets " of the firm is very slight. At the same time we intend to obtain everything possible.

" After careful consideration, the following plan of reorganization is presented by the trustees and recommended for " adoption, and has already the approval of a majority of the " stockholders of the old company.

" A new company, called 'The Stormont Mining Com-
" pany of 'Utah,' has been duly organized under the laws
" of that Territory with a capital of $500,000 in shares of $1
" each. The title to the Stormont mine, mill and all other
" property is now vested in this new company by the aforesaid
" purchases and assignment of judgments and lien claims.

" The Guarantee Trust & Safe Deposit Company of Philadel-
" phia, now holds all the stock of this company for moneys ad-
" vanced in the purchase of the property.

" Each stockholder in the old company may exchange his
" old stock for stock in the new company share for share.

" Each stockholder of the old company who has contributed
" or shall contribute before July 22d, 1882, twenty-five cents
" per share, is to be entitled to one share in the new company
" therefor. This disposes of $400,000 of the stock, leaving one
" hundred thousand (100,000) shares in the treasury as a reserve
" fund to be used only for the benefit of the company.

" Up to this time contributions on more than a majority of
" the old stock have been paid in, and are on deposit at the Ameri-
" can Exchange National Bank and when the balance is paid in
" all will then be turned over to take up the loan of the Guar-
" antee Trust & Safe Deposit Company.

" It may be proper to state that each trustee has pledged
" himself to furnish his share of the money called for under
" this plan and the board unites in recommending that all the
" stockholders do likewise.

" Printed certificates representing the new stock are now
" ready and will be exchanged for old stock upon presentation
" of the old stock at the company's office, No. 2 Nassau street,
" New York, with the receipts for the contribution of twenty-
" five cents per share attached. The printed certificates will be
" exchanged for engraved certificates as soon as the latter can
" be prepared.

" Approved by

" CHAS. S. HINCHMAN,
" M. F. DICKINSON,
" SCUHYLER VAN RENSSELAER,
" WALTER HINCHMAN,
" THEO. F. H. MEYER,
" THOS. COCHRAN,
" M. F. HUNT,

" Trustees."

MR. BROWN: I put this in evidence for the purpose of showing that on July 1st, 1882, it recites generally the conditions of the company and its affairs, and is signed by the seven trustees, and not one single word was said about this twenty-eight thousand shares of stock, that this man says was held for the Stormont Company.

THE COURT: That may be assumed.

Defendant excepts.

Q. I understood you to say that you had attended the Hite meeting on the 7th of July at the request of Mr. Tyler?

A. Of Mr. Tyler and of Mr. Camp, of the trustees there; it was a request that I should come there.

Q. Were you a trustee or stockholder in the Hite?

A. In the Hite—no, sir; my interest was only to get Stormont paid.

Q. Did you attend their meeting?

A. Only informally, sir; I was not present.

Q. What do you mean by informally; did you go in and sit and listen to the proceedings?

A. No, sir; I was called in when they wanted to see me.

Q. How many times?

A. I think only once.

Q. Did you make any remarks to the meeting?

A. Yes, sir; I gave a description of the Hite mine.

Q. Wasn't the talk after the meeting adjourned?

A. No, sir; I think it was during the meeting.

Q. Wasn't it before the meeting commenced?

A. It may have been, Doctor Lincoln was presiding I believe.

Q. It was before the meeting commenced?

A. I don't know, sir.

Q. You had just an informal talk with some gentlemen?

A. You may call it informal.

Q. Did you rise in your place and address the meeting, and were there remarks from the gentlemen sitting there?

A. I can't tell whether there were remarks or not. My impression is that somebody, while I was there, nominated Dr. Lincoln as chairman.

Q. You then got up and left?

A. I left; we had no other business in their conference at the time.

Q. You left?

A. I went into the next room, I think, when the meeting organized.

RE-DIRECT BY MR. FULLERTON:

Q. Do you recollect when Mr. Dickinson was elected a trustee?

A. Not from memory of the date.

Q. Do you recollect how long he held his office?

A. I think nominally for several months, but he asked to be excused very soon afterwards; his relations with the other companies, I think he said, complicated him a little, particularly with the company that Mr. Hunt was in, and he was in.

Q. Do you know when he resigned?

A. I don't think he ever resigned in writing.

Q. Then you don't know when he resigned?

A. No, sir. I don't know when he resigned; I think he verbally asked to be excused.

Q. Is there anything in the records upon that subject?

A. I am not sure, sir.

Q. I wish you would look and see?

A. Yes, sir; I think there must be, sir. (The witness examines minute book.)

Q. See when Mr. Dickinson's successor was appointed?

A. I find here on the 24th of June a proposition for the settlement of the indebtedness—

Q. I will let you examine that some other time.

A. I can find it very soon if there is anything here.

Q. We won't spend time in looking for it now. Be kind enough to turn to that part of the record which you pointed out a short time ago with reference to the action of the Stormont trustees with reference to the Stormont stock?

A. Yes, sir (indicating); Mr. Dickinson attended the meeting.

Q. Is *this* it?

A. That sheet pasted in is the original minute and the one right under it—

MR. FULLERTON: I propose to read in evidence the proceedings of the meeting of August 1st:

The minutes of the meeting of August 1st, previously identified on pages 50, 51 and 52, were then put in evidence and marked "Defendant's Exhibit E."

The minutes were then read in evidence and are as follows:

"Trustees' meeting held at No. 2 Nassau street, Aug. 1st, "1882.

"Present—Charles S. Hinchman, President, in chair; Hon. "T. Cochran, Vice-President; Theo. F. H. Meyer, S. Van "Rensselaer.

"Minutes last meeting read and approved.

"President Hinchman stated that Dr. R. P. Lincoln held "certain stocks belonging to Jno. R. Bothwell, late treasurer of "the Stormont Silver Mining Company, which had been held "by Wells, Fargo & Co. as collateral for a loan of about $15,000 "and which were sold and turned over by said Wells, Fargo & "Co. with the approval of said Bothwell to Chas. S. Hinch-"man, trustee, to be held for the benefit of the Stormont treas-"ury, immediately after the discovery of the defalcation in "Stormont Silver Mining Co.'s treasury, and that soon there-"after Dr. Lincoln, through his attorney, Col. M. W. Tyler, "claimed the same as having been assigned by bill of sale to "him as security for money loaned by him to Jno. R. Bothwell, "and threatened suit against said Hinchman, trustee, and "Wells, Fargo & Co. if not surrendered. Said stocks were then "surrendered to said Col. Tyler, attorney, on his paying to said "Hinchman said $15,000, and upon the distinct understanding "that Dr. Lincoln was to carry said stock and securities and not "sacrifice them, but market them to the best advantage; after "consultation with, and with the consent of the Stormont Co.'s "officers and after repaying himself the said $15,000 and the "amount found to be due him, then stated to be about $10,500, "the balance to be returned to the Stormont treasury, and if "any surplus remained over to go to the treasuries of the other "companies recently managed by Clark & Bothwell in propor-"tion to their indebtedness to each.

"This, Col. Tyler agreed, was equitable and fair, and that he "would recommend Dr. Lincoln to do so, and afterwards said to "Ch. S. H. that the doctor had so agreed; a formal agreement was "to be drawn up and signed on both sides embodying this "understanding, but on account of Messrs. H. & R. leaving

" soon after for the West, and being obliged to go further
" and stay longer than originally anticipated, it was never
" done. Soon after one of the Hite meetings, at which Dr. Lincoln
" presided, and which C. S. H. attended by request, Col. Tyler
" remarked that Dr. Lincoln would like to sell out his position
" in that stock, and Chs. S. Hinchman asked what he wanted.
" Mr. Tyler then remarked that he was authorized to sell for
" $21,000, which Ch. S. Hinchman remarked was too much on
" present outlook, but that he could fix it at $18,000. Col. Tyler
" said he could not do that, but would consult his client Dr. L.,
" and afterwards advised verbally that Dr. Lincoln would rather
" sell at that. There was no direct offer or acceptance, and it
" was understood that the parties Dr. L. & C. S. H. & M. W. T.
" then negotiating were to meet next day and conclude the
" matter if possible. Believing that some arrangement equit-
" able to all concerned would be reached, Pres't H. told the
" Sec'y to receive Dr. Lincoln's stock (without requiring the
" assessment or contribution receipts then required from all
" other stockholders sending in for new stock), and that he would
" arrange the rest with Dr. Lincoln.

" Under these circumstances Col. Tyler deposited with Sec'y
" Van Rensselaer a sealed bundle, & O. K. contain the secu-
" rities which Col. Tyler received from Mr. Hinchman as
" trustee on or about May 4th, 1882, under the before mentioned
" understanding. Mr. Van Rensselaer, supposing that Col. Ty-
" ler was acting in accord with a complete understanding with
" the President, then gave Mr. Tyler against the bundle which
" Mr. Tyler deposited with him, the form of receipt which Mr.
" Tyler desired, and under which Mr. Tyler now claims that he
" completed a delivery to Mr. H. individually. The Pres't
" further stated that in all his talks with Mr. Tyler and Dr. Lin-
" coln he had always said whenever his position came up that
" he should act only as a trustee for the Stormont Co. and for
" all shareholders alike, and that he never did nor intended to
" buy or offer for said securities for himself individually.

" The President's statement having been considered, it was

" Resolved, that Messrs. Hinchman & Meyer be appointed a
" committee with power to negotiate for the purchase of secur-
" ities with Dr. Lincoln, and to report the result of their nego-

" tiation to the Board of Trustees for approval and con-
" firmation.

" Resolved that Genl. Barnes be notified to levy judgment of " the Hite mine.

" Resolved, that this company offer to take one-half of their " claim against the Hite Company in cash, and one-half in bonds, " which shall be a first lien on the Hite mine and property to " the extent of $150,000, provided the Hite Company accepts the " same, and provide the money needed to pay off the labor " claims and current debts at mine on or before 10th of Au-" gust.

" Resolved, that in accordance with the statute for winding " up and dissolving corporations, this company shall be dissolved " and wound up.

" Resolved, Mr. Meyer and Mr. Van Rensselaer be appointed " a committee to negotiate with the Satemo Company con-" cerning the adjustment and purchase of their claims against " Clark & Bothwell upon an equitable basis.

" A communication from Wm. S. Clark, dated July 14th, " was read by the President, and on motion duly seconded, laid " on the table.

" On motion of Schuyler Van Rensselaer, duly seconded, " Hon. T. Cochran was elected Vice-President in place of Mr. " M. F. Hunt.

" Meeting adjourned.

" SCHUYLER VAN RENSSELAER.
" Sect'y."

Q. You have heard these minutes of the meeting read; do they state a fair history of what occurred with reference to this stock?

Objected to. Objection sustained. Defendant excepts.

RE-CROSS BY MR. BROWN:

Q. Will you just look at these records on page 51, about two-thirds of the way down the page, and you will see that the word " negotiations," is written in there in pencil, apparently over the word " matter?"

A. Yes, sir.

Q. Whose writing is that pencil?

A. I think it is mine, sir; I don't know positively, but I think so; I have not seen the book for six months until to-day.

Q. When did you write that?

A. At the time the minutes came up before me.

Q. And when was that?

A. Some six months, I suppose, ago; about the time of its date—six months; it was in August; sometime in the month of August; the next time I was there they were probably shown me. It is the handwriting of Mr. Van Rensselaer's clerk, who has not been in his employ for a good while.

Q. Will you now look at the resolution on page 52, commencing "The president's statement having been considered, it was resolved that Mr. Hinchman, etc., be appointed a committee," do you observe that in the record that has been stricken out with pencil?

A. Yes, sir.

Q. Who struck that out?

A. I can't tell you, sir.

Q. Is that intended to be struck out?

A. Yes, sir; I can make that perfectly plain to you.

Q. It was intended to be struck out?

A. Yes, sir; it was intended to be struck out; it is an error in copying it in; it could have been either rescinded or struck out.

Q. In this statement which you made to this board you say "that it was then understood that the parties, Dr. L.," who do you mean by that?

A. Dr. Lincoln.

Q. "C. S. L." Who do you mean by that?

A. I don't know.

Q. Or "C. S. H?"

A. If it was "C. S. H.," it was doubtless meant for myself.

Q. "M. W. T?"

A. That was meant for Tyler.

Q. Then "negotiating were to meet next day and conclude the matter." It stood that way before writing the word "negotiation" over the word "matter?"

A. Yes, sir; the record was a rough one; you can make it either.

Q. Do you remember upon whose motion this resolution was adopted appointing yourself and others?

A. I think it was upon the motion of Mr. Cochran, sir.

Q. Appointing a committee to negotiate with Mr. Lincoln?

A. Yes; Mr. Cochran was appointed and asked to be excused.

Q. Did that committee confer with Mr. Lincoln as a committee—talk with him?

A. Yes, sir.

Q. When?

A. At Long Beach.

Q. Mr. Meyer and yourself?

A. Yes, sir.

Q. Any one else?

A. No, sir; the committee consisted only of us—the other resolution, the clerk has forgotten to note, was rescinded.

MR. BROWN: I will read from this book, with your Honor's permission, a resolution passed at the meeting, December 5th, 1882, showing a corporate action with reference to this contention between those gentlemen and Dr. Lincoln. It is dated December 5th.

MR. FULLERTON: What is it, the indemnity?

MR. BROWN: Yes, the indemnity.

MR. FULLERTON: Read it, I have no objection.

The resolution was then read by plaintiff's counsel and marked "Plaintiff's Exhibit No. 19," and it is as follows:

"Meeting of the Trustees of the S. S. M. Co., held at 2 Nas-
"sau St., Dec. 5, 1882. Present:

"Chas. S. Hinchman, Pres.

"Walter Hinchman, Theo. F. H. Meyer and Schuyler Van
"Rensselaer, a majority of the board.

"The committee appointed to negotiate an equitable settle-
"ment with Dr. Lincoln for Bothwell stocks, reported that
"after conference with Dr. Lincoln and his attorney, M. W.
"Tyler, they were not able to arrive at any satisfactory terms
"of adjustment, whereupon it was moved and duly seconded
"and resolved that a suit having been begun by Dr. R. P. Lin-
"coln, against Mr. Charles S. Hinchman, wherein he seeks to
"hold him personally responsible for a pretended purchase of said

"stock made for its benefit, this company assumes "the defense of said suit and agrees to indemnify and "hold him harmless from any cost, expense or liabilities "thereon of every kind and nature.

"Moved, duly seconded and carried, that the secretary be "authorized to rent the offices of this company at the same rate "they now pay.

"Moved, seconded and carried, that the meeting adjourn.

"SCHUYLER VAN RENSSELAER,
"Secy."

Q. Who moved that resolution?

A. I can't tell you; I did not.

Q. I didn't ask you who did not?

A. I can't tell unless it is stated in the record; if the Secretary could get out of a sick bed, he could tell.

MR. BROWN: I want it also to appear that at the last meeting the trustees present were this gentleman and Walter Hinchman, Theodore Meyer and Schuyler Van Rensselaer.

Q. Did you ever communicate with Mr. Dickinson or any other trustee than those present the passage of either of these resolutions or the proceedings had at any one of these meetings?

A. All the trustees had access to the books.

Q. I ask you if you ever communicated that?

A. If I ever communicated what?

Q. Communicated with them?

A. I think Mr. Dickinson attended a meeting thereafter.

Q. Did you ever communicate to any other trustees than those present, the fact that these resolutions which have been read and these proceedings which have been read, had been had?

A. I think so; I think all the trustees were notified.

Q. Did you, I ask?

A. Individually?

Q. Yes; you individually?

A. I don't remember.

Q. Or as trustee?

A. I don't remember whether I did or not?

Q. You don't know whether you did or not?

A. No.

Q. Will you state that you didn't?

A. No, sir; I will not.

Q. Will you state that you did?

A. I don't know.

Q. Do you remember anything about it?

A. If you will let me see the list of trustees.

Q. I am asking for your recollection now?

A. My recollection? I don't remember whether you read that Mr. Cochran was present at this meeting or not, I am very certain he was advised.

Q. I ask you whether you gave notice to any trustees who were not present at these meetings?

A. Yes, sir; Mr. Cochran was not present I believe at one; I know he was fully familiar with it and was notified.

THE COURT: The question is whether you individually gave notice?

THE WITNESS: Yes, sir; I individually gave notice to Mr. Cochran.

Q. And to any other?

A. I don't think there was any other going there.

Q. They were regular meetings of the Board of Trustees?

A. They were no regular meetings.

Q. All the meetings were specially called, were they not?

A. No; I think there were days fixed originally by the by-laws, but we consulted the convenience of the gentlemen; they were notified whenever there was a meeting by the Secretary.

Q. So that you didn't pay any attention to the by-laws in having your meetings?

A. Yes; we called a meeting if we found the gentlemen could attend. There was a regular stated time, I think, quarterly.

Q. What day of the month generally?

A. It was fixed, I think, the first Wednesday or the first Thursday.

Q. Neither of these meetings of August 1st, 1882, or December 5th, 1882, were regular meetings, were they?

A. I can't say, sir.

THEODORE F. H. MEYER, being duly sworn and examined as a witness for the defendant, testified:

BY MR. FULLERTON:

Q. You are the attorney for the defense?

A. I am.

Q. The defense in thiscase?

A. I am.

Q. You are the Mr. Meyer that acted as a trustee of the Stormont Company?

A. I am.

Q. Do you recollect of making a visit to Long Beach in company with Mr. Hinchman?

A. I do.

Q. When was that, Mr. Meyer?

A. August 1st, 1882.

Q. Do you recollect seeing Mr. Lincoln there?

A. I do.

Q. Do you recollect the testimony of Mr. Lincoln as to what took place there between yourself, Mr. Hinchman and Mr. Lincoln?

A. I do.

Q. Did you hear Mr. Lincoln testify that when he was introduced, it was stated that Mr. Hinchman was the man that got from him securities—you heard the testimony to that effect?

A. I did hear the testimony; yes, sir.

Q. I want to ask you whether anything of that kind took place on that occasion?

A. There did not.

Q. How certain are you of that?

A. Absolutely.

Q. How is it that you can be certain; please state it?

A. It impressed itself upon my mind. We went down there on the day that I had been appointed a committee with Mr. Hinchman respecting these very securities; we went down there partially—we went down there for the purpose of seeing Dr. Lincoln, who was to be down there that night; and it was expected that we would settle the thing then and there, and when I was introduced to Dr. Lincoln, there was one allusion made to this affair. Mr. Hinchman introduced me as the gentleman who had been appointed the committee on those Bothwell securities; from that time on until we parted, there was not again a word said about the whole matter. Dr. Lincoln was evidently reluctant to take the matter up.

Q. So the fact that you were disappointed, and that the thing was not discussed, is what impressed it upon your mind?

A. Yes, sir; it impressed it upon my mind; I thought it was a wild goose chase.

Q. Calling your attention to this record that has been read in evidence, of August 1st, marked Defendant's Exhibit E, do you recollect the circumstances under which that record was made?

A. I do.

Q. You may state then what they were?

A. I was present at the meeting, and what is recorded here substantially took place. I was there at the meeting; I heard it all.

Q. That was a meeting of the board, was it?

A. It was a meeting of the committee.

Q. You may state whether Mr. Hinchman was called upon to report to that board as to what had taken place with reference to those securities?

A. Well, that is perhaps more than I can speak of of my own knowledge; that was the first meeting of the board that I attended, I think; that was the first meeting that I attended; everything was new to me.

CROSS-EXAMINATION BY MR. BROWN:

Q. How did you know that Dr. Lincoln was going to be there?

A. I was told so by Mr. Hinchman.

Q. Didn't you know that Dr. Lincoln was not stopping there at all, he was there accidently?

A. I didn't know anything about it.

Q. You went down there for the purpose of having a conversation with him as a member of the committee appointed under the resolution that has been read?

A. Yes, sir; and expected that we should have the conversation there.

Q. You went down for that purpose?

A. I was down for that purpose.

Q. You got down there and you say that the introduction was all that was said with reference to this matter after you got there?

A. Exactly.

Q. You didn't introduce it afterwards?

A. I didn't introduce it.

Q. Mr. Hinchman didn't introduce it as you know?

A. No.

Q. And the Doctor didn't introduce it?

A. No.

Q. So the committee went down there and said: "How do you do, Doctor, this is the man we have the trouble with about the Bothwell securities," and then you turned around and came back?

A. That was not it.

Q. Was anything more done?

A. Not the way you said it.

Q. Was anything more done than you have stated now on the stand?

A. Not more than I have stated; no.

DEFENDANT RESTS.

Testimony in Rebuttal.

MARQUIS F. DICKINSON, JUNIOR, being duly sworn as a witness for the plaintiff, testifies:

BY MR. BROWN:

Q. Where do you reside?

A. Boston.

Q. What is your business?

A. Lawyer.

Q. How do you happen to be here to-day?

A. I came over to attend a directors' meeting yesterday.

BY MR. FULLERTON: What are you going to show?

MR. BROWN: I am going to show he is here accidentally.

MR. FULLERTON: I will admit it.

Q. You were not subpœnaed here, Mr. Dickinson, to attend as a witness?

A. No, sir.

Q. You happened to come into the court, and found this case on?

A. I heard of it from Dr. Lincoln, who is an intimate friend of mine, at whose house I called.

Q. Were you in 1882 director and trustee of this Stormont Company?

A. Yes, sir.

Q. When did you become such?

A. May 4th.

Q. And down to what time did you continue to be a trustee?

A. January of the next year, I think.

Q. January, 1883?

A. Yes, sir. The last meeting I attended was December the 26th.

Q. Did you have any notice of this meeting of August 1st, the proceedings in which have been read?

A. I can't remember.

Q. You didn't attend that meeting?

A. No, sir.

Q. Did you have any notice of the meeting of December 5th?

A. I can't remember.

Q. Were you informed by any one of the proceedings which have been read in evidence here until you heard them here and saw them in the book in court here to-day?

A. Never.

Q. You know Mr. Hinchman?

A. Yes. I met him on the 2d or 3d of May, 1882.

Q. And you met the gentleman who brought the information here to New York that the property was for sale?

A. I learned it from an advertisement in the Silver Reef newspaper.

Q. And you came on to New York to see about it?

A. I wrote to Mr. Hunt, who has been referred to by Mr. Hinchman in his testimony. Mr. Hinchman was in New York the same day I was here.

Q. You saw him and talked with him?

A. Yes, sir.

Q. You drew the first circular?

A. Yes, sir.

Q. That has been put in evidence?

A. Yes, sir.

Q. Did you draw the circular of July 1st that has just been put in evidence?

A. Yes, sir.

Q. Between the dates of those circulars did you ever hear from Mr. Hinchman, or any other persons, that Mr. Hinchman had purchased, or proposed to purchase, or talked of purchasing, or held any stock of the Stormont Company, or any other company, for the benefit of the Stormont Company?

A. No, sir.

Q. Did you ever hear any such idea expressed by Mr. Hinchman or by anybody else before the 8th of July?

A. No, sir.

Q. When, if ever, did you hear that it was claimed that he had proposed to do any such thing, or had done any such thing?

A. After the controversy began between the parties; I can't tell when.

Q. Some time in the fall or winter, was it?

A. I should think so, in the fall.

Q. Were you present at any meeting of any trustees or any trustees' meetings prior to the 8th of July, when the subject of Mr. Hinchman's taking up the stock or securities for the benefit of the Stormont Company was discussed or referred to?

A. I was not, and no such talk was ever had at any such trustees' meeting, when I was present, on that subject, or referred to in any manner.

CROSS-EXAMINED BY MR. FULLERTON:

Q. You became a director, I think, May 4th, did you?

A. Yes, sir.

Q. 1882?

A. Yes, sir.

Q. And continued until January, 1883, you think?

A. I think it was January 26th.

Q. And how many meetings during that period did you attend?

A. About four, I should say.

Q. How many meetings were there altogether?

A. Six or seven.

Q. More than that, were there not?

A. No, sir; the record will show you exactly; you can count them up; not over six or seven. I could give them to you in a moment.

Q. Give them, if you please?

A. Yes, sir, I will. (Refers to memorandum.)

Q. Did you take it from the record?

A. Yes, sir.

Q. When?

A. This afternoon.

Q. You have been pretty active?

A. Yes, sir, as active as I could possibly be. (Having referred to memorandum). There were eight directors' meetings, including and subsequent to May 4th up to the date when my successor was elected, which was the 30th of January, 1883.

Q. Now, be kind enough to tell us which of those you attended?

A. May 4th, June 30th, December 6th, and one other which I do not find a reference to there.

Q. That is about the time your successor was elected?

A. That is about the time my successor was elected; I came in late one meeting, and my name does not appear there.

Q. That was after December 26th?

A. Yes, I think it was after December 26th.

Q. Now give me the dates of the meetings that you did not attend?

A. June 24th, July 23d, August 1st, December 5th.

Q. Then June 24th, July 23d, August 1st and December 5th, you were not present?

A. I was not present.

Q. Then if anything were said at any of these meetings when you were not present, with regard to Stormont taking the assignment of these claims, the reason why you didn't hear it was because you were not there?

A. No, sir—at the meeting, yes; the reason I didn't hear it at the meeting; but I was frequently here.

Q. I am asking about these several meetings?

A. That is the reason.

Q. You have been asked whether at any meetings of the Board of Directors this was discussed, and you told me now there were four meetings where you were not present; so that, if they were discussed at those meetings the reason you didn't hear it, was because you were not there?

A. That is the natural inference.

RE-DIRECT BY MR. BROWN:

Q. Who called the meetings of the 3d May at Mr. Tyler's office?

A. I did, I arranged for it; May 3d, I think, it was.

Q. Whatever it was?

A. May 3d.

Q. I refer to the meeting that Mr. Hinchman testified with reference to?

A. I should correct my testimony then and say that I was present at two meetings in May—May 3d and 4th. I was here two or three days, and if the meeting of May 3d was at Colonel Tyler's office, I was present then, and the following day, May 4th, in a place in the Globe Building—the London, Liverpool and Globe.

Q. You have heard Mr. Hinchman's testimony with reference to the meeting of May 3d at Mr. Tyler's office?

A. Yes, sir.

Q. Who called that meeting?

A. I did.

Q. Did you see Mr. Tyler present?

A. I saw him in one of the offices; he was not present during our election of the directors.

Q. Did he take any part whatever in the meeting on that occasion, either by his presence on that occasion or by suggestion or inference?

Objected to as new matter. Question withdrawn.

Q. Have you, since you have been in Court, examined this record book?

A. Yes, sir.

Q. Prior to the entry that has been read here under date of August 1st, 1882, is there any entry in that book with reference to this transaction, touching the Bothwell securities between Mr. Hinchman and Mr. ——?

A. No.

Q. None whatever?

A. No.

Q. I understood you to say that Colonel Tyler took no part in the meeting?

A. I said so.

Q. Dr. Lincoln was not there at that meeting?
A. No, sir.

MASON W. TYLER, being recalled for plaintiff, further testified:

BY MR. BROWN: Q. Mr. Hinchman stated upon the stand that you had upon one or more occasions advised him that he could not act with reference to the Bothwell securities except as trustee; is that or is it not true?

A. It is not true, except in the letter that has been read in evidence here in which I stated that fact; that is the first time I ever had any controversy with him about that.

BY MR. FULLERTON: Q. It is not true except so far as you recollect it; you wrote to him to that effect?

A. To that effect.

BY MR. BROWN: Q. In the letter that is in evidence?

A. In the letter that is in evidence. I am not sure but that letter came up in the interview of the 1st of August; certainly never prior to that. There was never any reference to him as a trustee in this transaction.

BY MR. FULLERTON: Q. Prior to August 1st?

A. Prior to August 1st.

BY MR. BROWN: Q. On the 7th July, when you stated to Mr. Hinchman that the doctor would take $18,000 for these securities, did Hinchman say to you that he thought that he could fix it for $18,000?

A. No, sir.

Q. Or words to that effect?

A. No, sir.

Q. Did you receive any note from Mr. Hinchman at any time postponing or explaining his absence from the appointment which he made to meet you at Dr. Lincoln's on the afternoon of the 8th of July, 1882?

A. No, sir.

Q. Did you ever send a note to him in regard to any such note?

A. No, sir.

Q. You received no communication whatever, did you?

A. No, sir. The first intimation that I had of it was when we called at the office on the afternoon of July 8th to close the transaction.

Q. Did you ever at any time, and particularly after Mr. Hinchman's return from the West, say to Mr. Hinchman that

you or the doctor had received any circular calling on you for deposit of the Stormont stock embraced in the Bothwell securities or use any words to that effect to him?

A. No, sir.

Q. Prior to Mr. Hinchman going to the West, did he request you to put in writing any understanding between yourself and him, or between Dr. Lincoln and him, to be submitted to him upon his return from the West?

MR. FULLERTON: I have asked that of this witness and he has said no, and I proved it was so.

THE COURT: I so recollect it, but I think he may answer again to save time.

A. No, sir.

Q. At the meeting of the Stormont Company trustees at your office on the 3d May were you present or did you take any part whatever in the meeting?

A. I didn't take any part in the meeting; I was about the office.

Q. Were you present during the meeting?

A. I was not.

Q. Was Dr. Lincoln present?

A. No, sir.

Q. Did you in reply to Exhibit 15, being letter of Mr. Van Rensselaer, asking for a copy of receipt Exhibit No. 2, send a copy of the receipt, which Mr. Van Rensselaer had given you?

A. I did.

Q. Had you prior to that given him any copy of that receipt?

A. I had not.

Q. Did he retain any copy of that receipt at the time he gave it to you?

A. He did not.

Q. You drew it there and took it away after he had signed it?

A. Yes, sir.

No cross-examination.

MR. FULLERTON: I want to put in evidence now article 13 of the by-laws.

Defendant's counsel then read as follows:

"Article 13. Meeting of the Trustees. A regular monthly meeting of the trustees shall be held on the first Tuesday of each month at 3 o'clock, P. M., without further notice than this by-law. Special meetings may be called at any time by the President."

Mr. Fullerton then offered to prove that the 1st day of August and the 5th day of December in the year 1882, were the first Tuesdays of said months respectively.

Counsel for the plaintiff admitted such to be the fact.

TESTIMONY CLOSED.

Mr. Fullerton sums up the case for the defendant. Mr. Brown sums up the case for the plaintiff. Before the cause was submitted to the jury, and before the Judge delivered his charge to the jury, defendant's counsel handed to the Court certain propositions in writing, which he requested the Judge to charge the jury. The Judge took the requests and proceeded to charge the jury as follows:

GENTLEMEN OF THE JURY—The plaintiff in this action alleges that upon the 8th day of July, 1882, he sold to the defendant certain stock and bonds, which are particularly described in the complaint and that the defendant agreed to pay therefor the sum of $18,000.

Of course, the burden is upon the plaintiff to establish to your satisfaction, and by a fair preponderance of evidence, the truth of the allegations of the complaint.

A contract, in legal contemplation, is an agreement between one or more parties for the doing or not doing of some particular thing. To a contract there are several important and necessary requisites. There must be, first, the parties; second, the consideration; third, the assent; and fourth, the subject matter.

One of the controversies, and perhaps the main controversy here, has reference to that element or requirement of a contract, known as the assent. It is asserted that there was no final agreement, that the minds of the parties did not come together upon the occasion referred to. Upon that subject I say to you, gentlemen, that it is necessary in order to establish a valid contract that the minds of the parties should meet. There must be a thorough and definitive understanding; nothing must be left to

future consideration or future negotiation; the thing sold must be definitely and clearly described; and the price must be fixed. If anything is left for future consideration, if the minds of the parties do not meet—then there is no valid contract which can be enforced in an action at law.

But if, on the contrary, the minds of the parties do meet; if in a contract of sale, for example, the purchaser agrees to buy and the vendor agrees to sell a certain specific chattel for a certain specific price—then, if that is the case, the minds of the parties do meet, and there is a valid contract. But whether or not that contract can be enforced in an action like this, depends upon other considerations.

It was ascertained many years ago, that it was unsafe to leave these solemn agreements to be established by testimony depending upon the fallible memory of man—testimony given, as in this case, for instance, long after the transaction occurred, and when the mind is clouded and obscured by a thousand intervening events.

To meet this difficulty, the English Statute of Frauds and Perjuries was passed in the reign of Charles the Second.

That law early found a place upon the statute books of this country, in substantially the same form in which it was originally passed. It is the law of the State of New York to-day, and, in so far as it is applicable to the questions in this case, it provides that every contract for the sale of a chattel valued at fifty dollars or more shall be void, unless that contract, or a note or memorandum of it, is in writing and signed by the party or parties to be charged; or unless some part of the consideration—the purchase money—is paid, or some part of the subject matter—the thing sold—is delivered under the contract.

If then a contract is in writing, or if a part of the consideration is paid, or a part of the property delivered, it is taken out of the provisions of the Statute of Frauds.

In the case at bar it is not pretended that the contract or any memorandum thereof was in writing. It is not pretended, of course, that any part of the consideration was paid; but the plaintiff seeks to avoid the force of the statute by proving facts from which he says that the jury may find that there was a delivery, or, to use the exact language of the statute, that the buyer did "accept and receive" the property sold or a part thereof.

At the close of the plaintiff's case a motion was pressed upon the Court, to induce the Court to say as a matter of law that there was not such an acceptance and receipt as was required by the statute. It was thought then, and it is thought now that this question, in view of the evidence in this case belongs to you, gentlemen, to determine, because where there is a dispute on the facts, no matter whether the facts preponderate one way or the other: if there are two contending theories in a case depending upon disputed evidence, the jury and not the Court should determine that controversy.

It was therefore concluded to send the case to you to answer two questions:

First, to say by your verdict whether or not there was a valid contract entered into between these parties, that is, such a contract as would be valid and binding if it had been reduced to writing. In other words, if precisely what took place upon the occasion referred to had been put in writing, would it have been a valid and final contract? That is the first question.

The second question is, was there such an acceptance and receipt of the property sold—if you find the property was sold—by the purchaser as would take the case out of the provisions of the Statute of Frauds.

Generally speaking, the contention on the part of the plaintiff is, that the defendant all through this transaction was acting as an individual; that he made his contract as an individual, and that the theory that he was acting as a trustee for somebody else or for the company, was an after-thought, and was advanced after the controversy or the litigation commenced.

Generally speaking, the contention of the defendant is, that he was acting throughout all these negotiations on behalf of the Stormont Company, and not as an individual.

I merely mention this now, in order that I may intelligently state to you what I conceive to be the rule of law, viz., that where a party, who has a representative character, deals with another party, and does not disclose that character, says nothing with reference to it, says nothing which would induce the other party to suppose that he was dealing as the representative of somebody else, the law will presume that he is dealing as an individual. But if the facts and circumstances are such, taking everything into consideration, as would induce the party with

whom he deals, to suppose that he is dealing as a representative; if he knew or ought to have known that he was so dealing, then the presumption would be overthrown.

To use the idea, if not the language, of a learned American writer upon this subject, the question is, "to whom did the promisee give credit? If the promisee gave credit to the promisor personally, and was justified in so understanding the case, and the promisor as a rational person knew or should have known that the promisee trusted to him personally, and he did not guard the promisee from so trusting him, he cannot afterwards turn him over to those he represents, because he must abide his responsibility."

These, gentlemen, very briefly and imperfectly stated, are the rules of law which are to determine your deliberations upon the questions which you are to answer.

Turning now to the evidence, let me say that I shall not attempt to state it accurately or in detail. Counsel on both sides have gone over it with great elaboration, and I have noticed that you have paid strict attention to the evidence, as it was adduced before you; and I may say that, if the counsel on either side, or the Court omit to state anything which they should have stated, or state anything incorrectly, it is for you, who are the sole judges of the questions of fact, to supply the deficiencies and say where the truth lies.

It is admitted in the answer that upon the 8th day of July, 1882, the plaintiff, Dr. Lincoln, was in possession of the stock described in the complaint, and the proof shows that the legal title to it was vested in him. The complaint alleges that this contract was made on the 7th and 8th days of July, at least the evidence establishes that it was made upon those days. What took place prior to that time, or what took place subsequent to that time, it seems to me is mainly important as throwing light upon the transaction which took place upon these days.

To use the illustration that I used a moment ago, if this contract had been reduced to writing, so that there was no ambiguity about it, so that there could be no mistake as to its terms, so that nobody could be mislead, it would not be necessary to go back to transactions occurring before or to go forward to transactions occurring afterwards, to explain it.

But if there is doubt as to its terms, then, gentlemen, you should take into consideration all the facts and circumstances

before as well as afterwards, so far as they throw light upon the transaction which is alleged to be the foundation of this contract.

It is in proof that Bothwell, or Bothwell and Clark, who were interested in the Stormont Company—I believe it was Bothwell alone—originally owned or held the securities; that he was a defaulter to the company and owed the company the sum of $76,000; that he had hypothecated this stock with Wells, Fargo & Co. as security for a loan of $15,000; that subsequently he had given the plaintiff in this case, Dr. Lincoln, a bill of sale or an assignment of the stock subject only to the prior claim of Wells, Fargo & Co.; and that the Stormont Company claimed an equitable interest by reason of the indebtedness which Bothwell owed to them.

This was the status of the stock upon the 3rd day of May, 1882, when Mr. Tyler, acting as agent for the plaintiff and with instructions from him, went down to the office of Mr. Hinchman, had some conversation there, and the two went together to Wells, Fargo & Co. and there Mr. Tyler made the tender of the $15,000 and demanded the stock. But prior to this, Mr. Hinchman had taken up the stock and had it in his possession, probably being ignorant of the assignment to Dr. Lincoln. And having paid the $15,000 to Wells, Fargo & Co., he held the stock upon the third or fourth day of May.

Before it was delivered there was a negotiation, and it was suggested that Dr. Lincoln should hold the stock; first, to pay the original indebtedness owing to him from Bothwell; second, the $15,000, which he had advanced to Wells, Fargo & Co.; and that the Stormont Company should have any advantage which would accrue after this indebtedness had been paid. But I think the evidence is that he refused to entertain any negotiations of that character until the stock was delivered to him; and upon the 4th day of May, 1882, the stock, bonds and all the property described in the complaint, were delivered by the defendant to Dr. Lincoln; and from that date until the 8th day of July, 1882, he held possession of them and held the legal title to them.

We now come to the transaction upon the 7th day of July. I believe I am correct as to the date, being the conversation which was opened by Mr. Tyler's stating to Mr. Hinchman—and

you will recollect the precise words—"these Bothwell securities are in a peculiar situation."

It was then suggested again that Dr. Lincoln should hold them for the purpose of procuring a payment of his debt, but equitably for the benefit of the Stormont Company. I think the evidence is that Dr. Lincoln assented to that proposition.

But there was a negotiation going on at various times during that day, and afterwards Mr. Tyler came to the defendant and said to him, "Why don't you purchase the securities? Why don't you stand in the position of Dr. Lincoln. Why don't you take his interest in the stock?" (I am now attempting to give Mr. Tyler's version of this conversation). Mr. Hinchman asked what Dr. Lincoln's interest was. Mr. Tyler said $26,500; but, he said, "I am authorized to sell his interest for $22,000, he being willing to throw off or lose $4,500." The defendant replied that it was too much. Mr. Tyler then said, "You make an offer," or, "Suppose you make an offer."

The defendant sat down and figured, and after figuring some time he said, "I will give you $18,000 for the stock."

Dr. Lincoln, who that day was in an adjoining room, presiding at a board meeting of the directors of another mining company, was seen by Mr. Tyler, who immediately came back from the defendant and said, "Dr. Lincoln accepts your offer."

In this connection, gentlemen, it may be proper to call your attention to the evidence of the defendant concerning this particular interview. I do not understand that, with one exception, in any material point he contradicts the evidence of Mr. Tyler. There is a disagreement as to the amount, he saying, I believe, that Mr. Tyler said he was authorized to sell for $21,000 instead of $22,000. But the main disagreement between the two witnesses has reference to the final answer. Mr. Hinchman says that after he had figured he looked up to Mr. Tyler and said, "I think I can fix it at $18,000," which would indicate that there was something more to be done and that he was in doubt whether or not he could arrange it as a final agreement. I think that I am correct in stating that that is the main discrepancy arising upon the evidence of these two witnesses with reference to that particular occasion.

Subsequently, the same day after the adjournment of Dr. Lincoln's meeting, he came out, saw Mr. Hinchman in the office and said to him: "I understand that you have purchased the

Bothwell or Stormont securities;" and to this Mr. Hinchman replied: "Yes." The evidence is, I believe, that Mr. Hinchman did not deny that conversation, although he did not recollect that it had taken place. (This is the plaintiff's theory of the transaction.) Mr. Tyler says that in pursuance of this agreement, it having been stated upon that occasion that the securities were not then present, that the next day, at three o'clock, in the office of Mr. Hinchman, was fixed as the place and time of delivery; and that, pursuant to that agreement, they went there upon the 8th day of July, and not finding Mr. Hinchman, delivered the stock to Mr. Van Rensselaer, and received his receipt.

So much, gentlemen, for the evidence on the part of the plaintiff.

I shall not attempt to recapitulate the evidence of the defense in detail, as I stated before.

It is insisted on the part of the defendant, that he told the plaintiff down to the last of these negotiations, that he was acting simply and solely as an officer of the Stormont Company, of which he was President and one of the trustees. He says that it was his sole object and desire to save what he could out of this wreck for the company; that his individuality was merged in his representative capacity; that he acted with the knowledge of Mr. Tyler, as a trustee; and that Mr. Tyler had advised him that he could act in no other way; and that it was his endeavor throughout to obtain this equitable interest for the Stormont Company.

It is further insisted, as predicated of the telegram which Mr. Tyler sent a few days afterwards, that there was no final agreement, because he requested that they should meet and close the negotiations.

What has been said with reference to that upon both sides is before you, and it is for you to give it such weight as you think it entitled to. Upon the first question presented to you, it will be for you to say whether, in view of all this evidence, the theory of the defendant has been made out; whether he has satisfied you that he was acting as a trustee, and that these negotiations were made by him as trustee.

If, on the contrary, you find that a fair preponderance of evidence—because the plaintiff should satisfy you by a fair preponderance of evidence—clearly establishes the allegations

of the complaint, that here was a definitive and well-understood agreement, upon the part of the plaintiff, to sell certain specified stocks and securities, about which there was no doubt as to their description; and if you find that the defendant upon that occasion agreed to pay therefor $18,000 as an individual—then, gentlemen, as I stated, the contract has been proved, and the first question you should answer in favor of the plaintiff.

But whether it can be enforced or not, as I stated, depends upon other considerations; and the next question is, if you find the first question in favor of the plaintiff, whether there was such an acceptance and delivery of the stock as will take it out of the operations of the statute.

The plaintiff insists—assuming now that you find the contract as stated in the complaint—that there is a presumption which arises from the contract itself, there being no other theory in the case, that where these parties agreed, the one to buy and the other to pay for this stock, the defendant having fixed a time and place for its delivery, and the property being delivered to some one at his place of business—there being no other evidence in the case—that there is a presumption that the delivery was made pursuant to the terms of the contract.

He has also referred to the receipt which has been read in your presence, a receipt, it seems to me, somewhat contradictory in its terms, signed by Mr. Van Rensselaer, stating that he has received this property for and on behalf of Mr. C. S. Hinchman. If it had ended there, very likely there would be no difficulty in understanding exactly what the receipt meant; but it went further and contained a condition.

You will recollect that it recites that the property was to be delivered to Mr. Hinchman; I will simply state the language in substance, "when he had performed his contract with Mr. Lincoln;" in other words, it attached a condition. If you find upon the evidence that that was all there was of this transaction, I think it my duty to say as matter of law, that there was not such delivery as would take the case out of the statute, because, if that were true, if he simply delivered the stock to Mr. Van Rensselaer, to be delivered to Mr. Hinchman, upon the payment of the sum by Mr. Hinchman, it would not be a receipt and acceptance by him, the possession would not be in him, he could exercise no dominion over it until he had performed the act

which it was necessary for him to perform in order to obtain the title.

To put it more plainly, perhaps the plaintiff would have in that event made Mr. Van Rensselaer his agent as well as the agent of the defendant.

The plaintiff also refers to the letter of Mr. Tyler, of July 21st, written to the defendant, which has been read, and which states in substance that upon this eighth day of July, "having learned from Mr. Van Rensselaer, that I might deliver the securities to him," &c., &c.

That is evidence which I think should be submitted to you, gentlemen, upon this question.

But it is also proper that I should say that the statement in that letter is not incompatible with the defendant's theory and the evidence to support it, that the delivery was made pursuant to the general plan of reorganization under which a large amount of stock was delivered to Mr. Van Rensselaer.

The plaintiff also insists upon the demand, and what took place with reference to the demand long afterwards.

It appears that he went to Mr. Van Rensselaer requiring him by written demand to return the stock; and in reply received a letter from Mr. Van Rensselaer saying, in substance, "I hold this stock for you and Mr. Hinchman, and have been forbidden by Mr. Hinchman to deliver it."

It is said, in view of all the circumstances in the case, that here was evidence of a ratification on the part of the defendant of an act which possibly might not have been authorized at the time the receipt was given. But they say, if the jury find that it was the intention of Mr. Hinchman by this act—by holding on to the stock—to receive it under this contract, then there was a ratification of the act of the agent; and it was an acceptance and receipt under the contract. Upon this question you also have the letter of the defendant of July 22d, I believe, in which he states, in reply to Mr. Tyler, that he gave Mr. Van Rensselaer instructions to receive the stock upon the joint account of the plaintiff and the Stormont Company. The plaintiff relies upon that to show that Mr. Van Rensselaer had some instructions to act in the premises; and the defendant relies upon it as conclusive upon the plaintiff, the plaintiff having put the letter in evidence as to the instructions which were received by Mr. Van Rensselaer.

Of course, if you find, that these were all the instructions which Mr. Van Rensselaer had, besides the letter of Mr. Hinchman written about the time of the demand, or sometime before the demand, in which he stated his reasons for requiring Mr. Van Rensselaer to hold on to the stock, then he would not have had authority to receive it for any other purpose than the one specifically indicated. Then there is a further theory, and you are to say to how much weight it is entitled to receive; that under the general plan of reorganization by which the old company was to be wound up and a new company formed, Mr. Van Rensselaer was made a custodian to hold the stock of all the stockholders and to give and deliver to them the stock of the new company in return.

It is said that having received these instructions to act as such custodian, that this receipt might have been given by him pursuant to those instructions, and those instructions alone.

Gentlemen, these are the various theories which have been advanced upon the one side and upon the other. There is a dispute in reference to the manner in which Mr. Van Rensselaer acted, the authority which he received and the authority which he had a right to exercise.

If you find upon these facts that, with authority from the defendant and acting for the defendant, Mr. Van Rensselaer received this stock and these bonds, and that that amounted to a receipt and an acceptance by the defendant of the property, then you will be at liberty to say that the contract is not void—if you find there was a contract—by reason of the provision of the Statute of Frauds and Perjuries.

The case, particularly upon this second branch of it, is complicated, but I think, gentlemen, you will have no difficulty in unravelling this somewhat tangled skein of evidence, and saying by your verdict where the truth lies.

If you find a verdict in favor of the plaintiff upon both these branches of the case, your verdict will be for $18,000, with interest from the 8th day of July, 1882.

I will say to the counsel on both sides that I refuse to charge the propositions handed up except as they have been already charged and that exceptions will be noted in each instance.

The defendant's requests were as follows:

FIRST. The plaintiff cannot recover in this action, unless he has satisfactorily shown in addition to an agreed price of the

stocks in question, also a delivery of them to, and an acceptance by, the defendant.

The Judge declined to charge said request except as already charged. Defendant excepted.

SECOND. If the delivery of the stocks to Van Rensselaer by Lincoln was only for the purpose of an exchange of the old for the new stock, in pursuance of the plan of reorganization, then it was not a delivery to the defendant, and the sale is void.

The Judge declined to charge said request except as already charged. Defendant excepted.

THIRD. In determining the question of delivery the jury are to take into consideration the evidence of Van Rensselaer, that he had been notified by Hinchman, the defendant, not to deliver the securities to Lincoln, the plaintiff, in connection with the letter of Hinchman dated August 24th, 1882, which gives his reasons for giving Van Rensselaer such notice, viz., because Lincoln had seen fit to disavow the understanding and agreement between them, and because he wanted a Court to pass upon the question between them; Hinchman claiming that the Stormont Mining Company had an interest therein.

The Judge declined to charge said request except as already charged. Defendant excepted

FOURTH. Inasmuch as the defendant (in his letter of August 24th, as President and Trustee of the Stormont Company, notified Van Rensselaer to retain the stocks because of a claim of that company upon them, such notification cannot be regarded as furnishing any evidence of acceptance of the stocks by him, individually, in pursuance of the alleged sale to him.

The Judge declined to charge said request except as already charged. Defendant excepted.

FIFTH. The language of the letter of July 21, 1882, written by Tyler to Hinchman, in which he says, "on July 8th, learning from Mr. Van Rensselaer that you had left word with him to

receive the securities," although it is to be considered in determining the question of delivery and acceptance, yet it is also consistent with the theory of the defendant that the securities were left for the purposes of reorganization.

The Judge declined to charge said request except as already charged. Defendant excepted.

SIXTH. The letter of July 22d, 1882, written by the defendant to Tyler, in which he says, "I told Mr. Van Rensselaer that he could receive the Stormont stock held by you for joint account of yourself and Stormont," having been put in evidence by the plaintiff, he is bound by the language employed in it, and it furnishes evidence, that the defendant intended that Van Rensselaer should receive the 28,400 shares of the Stormont stock only, and not the other stocks mentioned in the complaint. That it also tends to show that what was written in that letter, was not intended as an acceptance of the stock in pursuance of the alleged purchase by him.

The Judge declined to charge said request except as already charged. Defendant excepted.

SEVENTH. The receipt given by Van Rensselaer does not show an unqualified delivery of the stock to him by the plaintiff, and if the jury find no other evidence of such delivery in the case, the verdict must be for the defendant.

The Judge declined to charge said request except as already charged. Defendant excepted.

EIGHTH. That inasmuch as the receipt provides for the delivery of the securities to defendant when he fulfills his contract to purchase, it is a conditional delivery only, and could only become an absolute one, when the purchase money was paid. That not having been paid the delivery never took effect.

The Judge declined to charge said request except as already charged. Defendant excepted.

NINTH. If the jury believe that the defendant never author-

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ized Van Rensselaer to receive the certificates of stock as stated in the receipt "on behalf of C. S. Hinchman," then the receipt furnishes no evidence whatever, that they were so received, and is to be disregarded by the jury on the question of delivery.

The Judge declined to charge said request except as already charged. Defendant excepted.

TENTH. That the defendant had a right on behalf of the Stormont Company, inasmuch as he was its president and a trustee, and it was proper for him to make an arrangement with Lincoln to have the surplus derived from the sale of the securities applied to the payment of the demand of the Stormont Company, and if what he did to get the securities in the hands of Van Rensselaer, was to effect that object, then it cannot be construed into an acceptance by him of the securities as purchased.

The Judge declined to charge said request except as already charged. Defendant excepted.

ELEVENTH. That there is no evidence in the case of a completed sale of the securities to the defendant, and the plaintiff, therefore, cannot recover.

The Judge declined to charge said request except as already charged. Defendant excepted.

The defendant also excepted to that part of the charge in which the Court stated that the question of delivery was one for the jury, and claims. that, inasmuch as there was no dispute about the facts, the question was one of law, which the Court should pass upon.

The defendant also excepts to that part of the charge, where the Court spoke to this effect: that the question for the jury was whether there was such an acceptance and receipt by the purchaser of the stocks in question, as to take the case out of the statute, claiming that under the evidence that was a question of law which the Court should pass upon.

The defendant also excepts to that part of the charge, where the Court stated that although the contract was agreed upon,

yet the question remained whether it could be enforced, and that depends upon the Statute of Frauds.

The defendant also excepts to that part of the charge, where the Court stated that the presumption was, that there was a delivery of the property in pursuance of an agreement—whatever was said to that effect.

The defendant also excepts to that part of the charge, where the Court stated that if this delivery was made to one in the place—referring to Mr. Van Rensselaer—it would be presumed that the delivery was made for the benefit of the defendant and accepted by him.

The defendant also excepts to that part of the charge, which referred to the probable acceptance by Mr. Van Rensselaer for or on behalf of the defendant, alleging that he had no authority to accept on behalf of the defendant, except what was contained in the acceptance before the Court, and that that did not confer any such authority.

The jury thereupon retired, and afterwards brought in a verdict for the plaintiff in the sum of $18,000, with interest from the 8th of July, 1882; and inasmuch as none of the said several exceptions so offered and made to the opinion, decision and rulings of the Judge, and to his charge to the jury, appear by the record of the verdict aforesaid, the said counsel for the defendant did request the Court to sign this bill of exceptions, as of the 11th day of February, 1884, the day the said verdict was rendered.

ALFRED C. COXE, [L. S.]
Judge.

We agree to the foregoing bill of exceptions, and consent that the same may be settled accordingly, and signed by Hon. Alfred C. Coxe, before whom the case was tried, as of the 11th day of February, 1884, and that the same may be filed on or before the 30th day of June, 1884, *nunc pro tunc* as of said 11th day of February, 1884.

Dated New York, June 19th, 1884.

BEACH & BROWN,
Plaintiff's Attorneys.
THEODORE F. H. MEYER,
Attorney for Defendant.

Endorsed: "Filed June 27th, 1884."
TIMOTHY GRIFFITH,
Clerk.

137 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

RUFUS P. LINCOLN *vs.* CHARLES S. HINCHMAN.

Know all men by these presents that we, Louis H. Meyer, of 21 Nassau street, in the city, county, and State of New York, and Henry Amy, of number 16 West 27th street, of the city, county, and State of New York, are held and firmly bound unto the above-named Rufus P. Lincoln in the sum of twenty-six thousand dollars, to be paid to the said Rufus P. Lincoln, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the ninth day of July, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas the above-named Charles S. Hinchman has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Charles S. Hinchman shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

L. H. MEYER. [L. S.]
H. AMY. [L. S.]

Sealed and delivered and taken and acknowledged this 9th day of July, 1884, before me.

[L. S.] ANDREW A. HENDERSON,
Notary Public, N. Y. City & Co.

138 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Louis H. Meyer and Henry Amy, being duly sworn, depose and say, and each for himself says, that he is worth the sum of fifty-two thousand dollars over and above all his just debts and liabilities and exemptions.

L. H. MEYER.
H. AMY.

Sworn to this ninth day of July, A. D. 1884, before me.

[L. S.] ANDREW A. HENDERSON,
Notary Public, N. Y. City & Co.

[Endorsed:] Vol. —, page —. U. S. circuit court. Rufus P. Lincoln *vs.* Charles S. Hinchman. Bond for costs on writ of error. The within bond approved as to form and sufficiency of sureties July 11, 1884. Wm. J. Wallace. U. S. circuit court. Filed July 15, 1884. Timothy Griffith, clerk.

139 UNITED STATES OF AMERICA, *ss:*

To Rufus P. Lincoln, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-four, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles S. Hinchman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Dated New York, July 11th, 1884.

WM. J. WALLACE.

[Endorsed:] U. S. Supreme Court. Charles S. Hinchman, plaintiff in error, against Rufus P. Lincoln, defendant in error. Citation. Theodore F. H. Meyer, att'y for pl'ff in error, 47 William St., New York city. Due service of a copy of within citation is hereby admitted this day. Dated New York, July 15, 1884. Beach & Brown, pl'ff's att'ys.

[Stamped:] U. S. circuit court. Filed July 15, 1884. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 357. Charles S. Hinchman, plaintiff in error, *vs.* Rufus P. Lincoln. Filed October 9, 1884.

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Supreme Court U.S.
FILED.
NOV 5 1887
JAMES H. McKENNEY.

No. 77. October Term, 1887.

IN THE

Supreme Court of the United States.

Charles S. Hinchman,
Plaintiff in Error and Defendant below,

vs.

Rufus P. Lincoln,
Defendant in Error and Plaintiff below.

Error to the Circuit Court of the United States for the Southern District of New York.

Brief of Plaintiff in Error.

A. H. WINTERSTEEN,
WAYNE MacVEAGH,
For Plaintiff in Error.

ALLEN, LANE & SCOTT, PRINTERS, PHILADELPHIA.

Supreme Court of the United States.

Charles S. Hinchman, Plaintiff in Error,	October Term, 1887.
vs.	No. 77.
Rufus P. Lincoln.	

STATEMENT OF THE CASE.

The action in the court below was brought by Rufus P. Lincoln against Charles S. Hinchman to enforce a claim for $18,000 alleged to be founded on a contract said to have been entered into by Hinchman July 8th, 1882, to purchase of Lincoln certain securities. These securities were mostly mining stocks which had belonged to one John R. Bothwell, who assigned them to Lincoln by bill of sale April 30th (Record, pages 11 and 12), which purported to pass the title subject to a prior debt to Wells, Fargo & Co., in whose custody they then were. Bothwell at the time of the transfer was a member of the firm of Clark & Bothwell, and treasurer of the Stormont Silver Mining Company and the Hite Gold Quartz Company. Clark, the other member of the firm, was president of both the companies. The firm of Clark & Bothwell, it was discovered in 1882, had embezzled the proceeds of about $76,000 worth of bullion of the Stormont Company, and had advanced that amount to the Hite Company, of which Rufus P. Lincoln was vice-president and director, and Bothwell treasurer. (Page 48.)

Upon discovering the fact, the Stormont Company promptly ejected the embezzlers from their positions in the organization, elected Charles S. Hinchman president, and Schuyler Van Rensselaer secretary and treasurer, and proceeded to assert its claim for the embezzled funds. Hinchman had been a trustee of the Stormont Company since 1881, and was greatly interested in its success, being the owner of thirty or forty thousand shares of its stock, out of a total of two hundred thousand shares. (Pages 48, 49, 74.) Upon being elected president of the company in May, 1882, and becoming therefore entitled in a measure to act for it, he began taking immediate steps to relieve the company of the embarrassment which had been occasioned by the defalcations of its former officers. Learning of the fact that Bothwell owned the securities before referred to subject to a debt of about $15,000 to Wells, Fargo & Co., with whom they were deposited as collateral, with the assistance of Thomas Cochran and Walter Hinchman, fellow trustees, and large stockholders of the Stormont Company (Pages 74, 76), he raised money to pay the debt (Page 78) and, with the approval of Bothwell, obtained the securities. (Page 97.) Rufus P. Lincoln, transferee of these stocks and bonds under the earlier bill of sale, then notified Hinchman, through his attorney Mason W. Tyler, and asserted a prior right, and demanded them. (Page 11.) Hinchman recognized Lincoln's claim, and delivered the securities to Tyler, after being paid the amount expended to secure them. (Page 14.) Before doing so he sought to obtain from Tyler for the Stormont Company an agreement by which the proceeds, after the payment of Bothwell's debt to Lincoln, for which they had originally been transferred to him, should go to the Stormont Company. (Page 13.) Tyler got the securities, and Lincoln assented to the proposed arrangement afterwards. (Page 18.)

Two months thereafter, on July 7th, 1882, Lincoln, Tyler, and Hinchman met at the office of the *Stormont Company* in New York. The Stormont Company had a claim against the Hite Company by reason of its use of the proceeds of the Clark & Bothwell embezzlement, and Hinchman, trustee and president of the Stormont Company, at the request of the officers and

directors of the Hite Company, among whom were Tyler and Lincoln, went to New York to consult them about it. Then and there occurred the conversation that forms the basis of this controversy. Tyler and Hinchman being alone together, Tyler offered to sell Lincoln's position with regard to the securities for $22,000. The testimony of Tyler is to the effect that Hinchman made a counter proposition in the words, "I will give him $18,000 for those securities." (Page 15.) Hinchman testified that he said that "I thought I could fix it for him at $18,000." (Page 50.) The closing of the negotiations was proposed and a meeting between the parties was arranged for the next day. Hinchman returned to his office, as he testifies, found that he could not see his co-trustee Meyer and a majority of the trustees of the Stormont Company, and wrote Tyler a letter to that effect, explaining why he could not meet him the next day. (Page 51.) Tyler and Lincoln came to the Stormont Company's office July 8th, in the absence of Hinchman, delivered the securities to Schuyler Van Rensselaer, the secretary and treasurer of the Stormont Company, and had him sign a receipt which had previously been drafted by Tyler, and took it away. The parties were unable to meet until July 20th, when Tyler mentioned that he had delivered the securities to Van Rensselaer. Hinchman, supposing that he referred only to the portion of the securities represented by Stormont stock replied, "Yes, that was all right." (Page 23.) Hinchman wrote to Tyler the next day, postponing an engagement to meet him, saying, "I shall have to postpone our further negotiation until over next week. Meanwhile I will see that no action is taken which will cut out any rights of Dr. L." (Lincoln). (Page 24.) This brought replies from Tyler and Lincoln (Pages 25, 26), urging the prompt closing of the negotiation by the payment of the money. From the tone of the letters and the assumptions in them that Hinchman was understood to have made a definite offer to purchase the securities on July 7th, and that the offer was in his individual capacity — *assumptions then conveyed to Hinchman for the first time*—he was obliged to set forth his understanding of the negotiations between them, which he did by a letter to

Lincoln July 22d. (Pages 17, 18.) He explained in it that he had authorized Van Rensselaer to receive *the Stormont stock* held by Lincoln for the latter's joint account and that of the Stormont Company, pending an arrangement by which a certain assessment due upon the Stormont stock of Lincoln, twenty-eight thousand four hundred shares, was to be temporarily carried for Lincoln. (Pages 57, 58.) He intimated that Van Rensselaer, knowing that he was in negotiation with Lincoln, had without authority taken charge of the whole lot of securities (embracing more than the Stormont shares) as handed over by Tyler. This brought out further correspondence and interviews between the parties, in which it was asserted on the one hand by Tyler and Lincoln that Hinchman in the interview of July 7th had definitely for himself engaged to purchase the miscellaneous Bothwell securities for $18,000, and in which, on the other hand, it was stoutly maintained by Hinchman that his position all along, in the knowledge of Lincoln and Tyler, was that of a trustee for the Stormont Company, seeking only to secure its interests, and receiving with favor and promise of assistance a proposition of sale of securities to the company, or to himself as its representative. At a meeting of the trustees of the Stormont Company, held August 1st, Hinchman, president, stated at length his efforts to obtain the Bothwell securities for the company. A resolution was promptly adopted authorizing a negotiation for the purchase of the securities. (Page 91.) Lincoln persisted in his assertion that Hinchman had individually agreed to purchase the securities from him. The pretension of course met with no favor, and late in the year 1882 the present suit was begun to compel Hinchman to fulfill the terms of the alleged contract. Immediately thereafter the trustees of the Stormont Company, at a regular meeting held December 5th, by resolution assumed the defense of the case and agreed to indemnify him against costs and liability in connection with it.

The case came on to be tried in due course and by reason, as it is submitted, of errors of the learned trial judge in his conception of the case and consequent errors in his rulings

on the points of law submitted, a verdict was found for the plaintiff for the amount of his claim with interest. To correct these errors the writ of error was taken by the defendant, the present plaintiff in error.

SPECIFICATIONS OF ERROR.

1. The court below erred in declining at the close of the evidence for the plaintiff to direct a verdict in favor of the defendant. Record, page 47.

2. The court below erred in not directing a verdict for the defendant at the close of all the evidence.

3. The court below erred in declining to charge the *Eleventh Request* of the defendant, which request was as follows:—

That there is no evidence in the case of a completed sale of the securities to the defendant, and the plaintiff cannot recover. Record, page 125.

4. The court below erred in declining to charge the *Eighth Request* of the defendant, which request was as follows:—

That inasmuch as the receipt (given by Van Rensselaer) provides for the delivery of the securities to defendant when he fulfills his contract to purchase, it is a conditional delivery only, and could only become an absolute one when the purchase-money was paid. That not having been paid, the delivery never took effect. Record, page 124.

5. The court below erred in declining to charge the *Ninth Request* of the defendant, which request was as follows:—

If the jury believe that the defendant never authorized Van Rensselaer to receive the certificates of stock as stated in the receipt "on behalf of C. S. Hinchman," then the receipt furnishes no evidence whatever that they were so received, and

is to be disregarded by the jury on the question of delivery. Record, page 125.

6. The court below erred in charging the jury that it was for them to say "whether there was such an acceptance and delivery of the stock as will take it out of the operations of the statute of frauds. Record, page 120. Exception, page 125.

7. The court below erred in charging the jury as follows:—

If you find upon these facts that, with authority from the defendant, and acting for the defendant, Van Rensselaer received this stock and these bonds, and that that amounted to a receipt and acceptance by the defendant of the property, then you will be at liberty to say that the contract is not void —if you find there was a contract—by reason of the provision of the statute of frauds and perjuries. Record, page 122. Exception, page 125.

8. The court below erred in admitting in evidence the receipt of Van Rensselaer of July 8th. Record, page 19.

ARGUMENT.

The several assignments of error may be discussed under the two propositions:—

I. *There was no sufficient proof of the contract declared on to warrant a submission of the case to the jury and a verdict for the plaintiff.*

II. *There was no sufficient proof of acceptance and receipt of the securities under the contract declared on to warrant a submission of the case to the jury and the verdict for the plaintiff.*

I.

There was no sufficient proof of the contract declared on to warrant a submission of the case to the jury and a verdict for the plaintiff.

The first fundamental error in the case, it is conceived, was committed by the learned trial judge in practically casting the burden of proof as to the *nature of the contract* declared on upon the defendant. This was done in the charge to the jury, and it was the moving ground for the refusal at the close of the plaintiff's evidence to direct a verdict for the defendant. The fact of the contract having been made, it was properly said at the opening of the charge, was to be proved affirmatively by the plaintiff. This having been said, the important additional proposition was not fully acted on by the court and fairly submitted to the jury, viz.: *The burden was upon the plaintiff to show that the contract was made with Hinchman as an individual, and not as trustee of the Stormont Mining Company.*

The point may be illustrated by reference to a portion of the charge. The rule of law applicable to the case is thus laid down by the court:—

"That where a party who has a representative character deals with another party, and does not disclose that character, says nothing with reference to it, says nothing which would induce the other party to suppose that he was dealing as the representative of somebody else, the law will presume that he is dealing as an individual. But if the facts and circumstances are such, taking everything into consideration, as would induce the party with whom he deals to suppose that he is dealing as a representative; if he knew or ought to have known that he was so dealing, then the presumption is overthrown." (Pages 115, 116.)

This is a proper rule of law to be laid down in cases where the party who has a representative capacity deals with the other party *for the first time*. It is not a proper rule of guidance in such a case as this, where prior to the alleged contract there had been many negotiations between Hinchman *in a confessed and known representative capacity* and the plaintiff as to this same subject-matter. The proper rule for the case would have been the reverse of what was stated, viz.: *Where a party who has a representative character deals with another party with whom he has frequently and recently been dealing in that character, which is fully known and accredited by the*

other, and does not specifically disclose that he is acting as an individual in the particular dealing, the law will presume that he is continuing to deal in his representative capacity.

It was signally misleading to the jury to direct them to follow the former rule. From it they doubtless at once concluded that unless it were proved that the defendant had asserted specifically, or in an unmistakable manner in every instance, that he was acting for the Stormont Company, he must be held personally liable upon all contracts that he was unfortunate enough to negotiate for it.

Had the court rightly conceived the case in this respect they must have directed a verdict for the defendant, either at the close of the evidence for the plaintiff or when all the evidence was in.

The plaintiff's case disclosed the following facts as to Hinchman's relation to the negotiations for those securities. As the known representative of the Stormont Company, he had sought to obtain from Lincoln an interest in those proceeds after Bothwell's debt to Lincoln was paid from them. (Page 13.) He persisted in this negotiation on behalf of his company, until Tyler agreed to try to persuade Lincoln to make the arrangement. Lincoln agreed so to do. (Page 15.) At the time of the alleged contract declared on, Tyler and Hinchman were talking about relieving Dr. Lincoln of an assessment due the Stormont Company on that portion of the Bothwell securities represented by its stock. Tyler proposed a sale in the words, "Why don't you buy the securities and *get rid of them*." Hinchman, as claimed, then made the offer to *get rid of them* by purchasing them, the language put into his mouth being, "I will give him $18,000 for the securities." Lincoln came from an adjoining room, and Hinchman, it was claimed, answered affirmatively the question, "Well, I hear you have concluded to buy the Bothwell securities?" (Page 16.) Lincoln testified (page 43) that Hinchman introduced him afterwards to Meyer at Long Beach with the words, "This is Dr. Lincoln, from whom I have the Bothwell securities." Upon these naked facts alone, had proper weight been given to the presumptions in the case, there should

have been a peremptory direction for the defendant. It was conceded that Hinchman had previously been negotiating for the securities as a trustee for the Stormont Company, and that his errand at the place where the alleged contract was made, was to further the interests of that company in securing its claim against Clark & Bothwell and the Hite Company. The proposition was then made to him, as the plaintiff's witness testified, "Why don't you *buy* the securities and *get rid of them?*" What more natural than a response for the company in a personal form—"I will give him $18,000 for the securities"—assuming now, for argument's sake only, that the words put into the defendant's mouth by the plaintiff were actually used by him. The personal form is, indeed, a very common form of contract for men to assume who have the chief direction of others' interests. Such contracts do not cease to be the contracts of those for whom they are made, nor become those of the representatives by whom they were made because the personal form is used.

Moreover, the form of the proposition Tyler swears he made, "Why don't you buy the securities and *get rid of them*," itself negatives the theory that it was made to Hinchman personally, or could have been understood or accepted by him as personal. The suggestion to buy and get rid of the securities implied that the securities as they were then held stood in the way of some project on foot. That project was the recovery for the Stormont Company of the money due from Clark & Bothwell. Lincoln had already agreed to hold the securities in his hands for the Stormont Company after his own debt should be paid. It is difficult to see how the sale of those securities to a third person on his individual account would *get rid of them.* It would only be transferring them from one individual to another, and they would still be outstanding, so far as the Stormont Company was concerned, and yet remain to be gotten rid of by it. They could only be gotten rid of by a purchase by the company.

When the nature and purpose of the offer of sale is considered, therefore, it is only intelligible as being made to the Stormont Company.

The personal form of acceptance by Hinchman is thus unimportant when the offer could only have been made to the company. The presumption can only be that the acceptance was intended to be for the company.

Lincoln's testimony that Hinchman introduced him to Meyer at Long Beach in the words, "This is Dr. Lincoln, from whom I have the Bothwell securities," may be set down as false, if it is meant to be understood by this alleged language that Hinchman thereby acknowledged the purchase of the securities by himself personally.

This, without considering the plain and direct denials of it by both Meyer and Hinchman in the testimony for the defendant. The alleged Long Beach interview took place August 1st. This was more than a week after Hinchman's letter to Dr. Lincoln (page 17), in which he explained to Lincoln that he had given authority to Van Rensselaer to receive the Stormont stock (which was part of the Bothwell securities), for joint account of Lincoln and the Stormont Company, and in which he distinctly stated that in those transactions he occupied the position of a trustee for the Stormont Company. The words alleged by Lincoln to have been spoken by Hinchman, therefore, could not have been uttered by him.

There is nothing further in the plaintiff's testimony showing or tending to show that the contract was an individual one on the part of Hinchman. The theories of its nature constructed after it was made are wholly antagonistic, as shown by the letters that passed between the parties.

They do not make very far to establish the plaintiff's claim, which he was bound to do before the court could leave it to the jury to find for the plaintiff.

With the presumption from previous dealings between the parties (in which Hinchman acted as trustee) wholly tending to establish that a continuance of such dealings in the same way was contemplated at the time of the alleged contract of July 7th; and with no assertion or indication by Hinchman at the time that he wished to change his attitude in the matter; there was nothing substantial upon which the court could properly go in declining to withdraw the case from the jury at the end of the evidence for the plaintiff.

And if the court should have directed a verdict for the defendant before the evidence for the defendant was in, it was eminently proper for it to have done so when that evidence had been submitted. Overwhelming proof was given for the defendant that Hinchman not only did not contract in his individual capacity, but that there was nothing in his relations to the subject of controversy to furnish any reason for his so doing had he chosen to do so.

It was shown that the Stormont Company had a plain object in seeking to obtain the Bothwell securities, viz., the payment from them of Bothwell's debt to it of $76,000; that Hinchman had been in negotiation with Lincoln and his counsel, to effect this object. (Pages 48–50.) *Hinchman himself had no motive for purchasing them. He had no personal claim against Bothwell. Bothwell did not owe him money and, as he testified, he never had any individual transactions with Bothwell.* (Page 48.) The theory of the case that seeks to make him an individual buyer of these securities requires us to believe that *without motive for so doing* he violated his trust to the Stormont Company, and set himself up against it as a competitive bidder for the securities. Hinchman testified that during the course of conversation between himself and Tyler, Lincoln's counsel, prior to the alleged contract of July 7th, "*Mr. Tyler had been told by him that he would never act in any other capacity than as a trustee of Stormont affairs.*" (Page 55.) The fact of this communication having been made is not denied by Tyler in his evidence given in rebuttal, or anywhere else in the testimony. (Pages 111–112.) Tyler merely denies that he (Tyler) had *advised* Hinchman that he could not act except as a trustee for the Stormont Company. (Page 111.) He also states (pages 28–30) that after the alleged purchase of July 7th Hinchman did not intimate, until in his letter of July 21st and in an interview early in August, that the securities *had* been purchased by him as trustee. These statements do not, of course, constitute a denial of what Hinchman swears he plainly communicated to Tyler—*that he would never act in any other capacity than as a trustee of Stormont affairs.*

It must then be taken as proven that Tyler and Lincoln on

July 7th knew Hinchman's sole status as a trustee, and that any form of offer for the sale of the securities in question would be understood by him as an offer made to the company he represented. With this knowledge, if the plaintiff's testimony is believed, the form of the offer of sale made on July 7th appears as nothing less than *a trap to catch Hinchman and hold him to a personal liability.* The urgency with which the delivery of the securities was pressed, and a receipt, drafted by the plaintiff to carry out his purpose, obtained from Van Rensselaer in the absence of and without knowledge of Hinchman, bears out this theory of design on the part of the plaintiff. The only escape from this logical deduction from the evidence bearing on the contract, discreditable as the deduction is to the plaintiff, is to hold the theory of the defendant, viz., that Tyler was in error in testifying that there was an absolute undertaking to purchase the securities.

Indeed the *plaintiff's evidence shows this.* Tyler telegraphed to Hinchman *July 11th, "Please make appointment for closing negotiations with Lincoln."* (Page 20.) This shows that at that time, which was *four days after the date of the alleged contract, in the plaintiff's own view, there was no final undertaking to purchase the securities.*

Hinchman's version of the undertaking, being that he "thought he could fix it at $18,000" (pages 50 and 82), is the only one which harmonizes all the facts of the case before and after the interview of July 7th. The contract *was* a personal one only so far as Hinchman undertook to arrange or bring the sale about. It was also that of the company in so far as that when it should be completed the company should alone be bound as purchaser.

On the whole, the presumptions from previous facts and the relations of the parties were in the defendant's favor, and the first important error of the court was in practically refusing to give him the benefit of this presumption.

II.

There was no sufficient proof of acceptance and receipt of the securities under the contract declared on to warrant a submission of the case to the jury and the verdict for the plaintiff.

The court properly stated to the jury that, the alleged contract being oral, by the statute of frauds the plaintiff was bound to show receipt and acceptance under its terms before he could recover.

The error of the court here was in leaving it to the jury to infer an acceptance and receipt by the defendant when, as it is respectfully insisted, there was no sufficient evidence of such delivery to go to the jury.

The plaintiff's evidence for delivery was merely this: On July 8th, Tyler and Lincoln went to the office of the Stormont Company, and in Hinchman's absence from the city handed the securities to Van Rensselaer, the treasurer of the company. They induced Van Rensselaer to sign a receipt previously drafted by Tyler in the following form:—

"Received of Dr. Rufus P. Lincoln the following certificates of stock on behalf of C. S. Hinchman, and to be delivered to him when he fulfills his contract with Dr. Lincoln to purchase said stocks for $18,000." (Page 19.)

On July 20th Hinchman, in an interview with Tyler, as alleged by the latter, referring to the delivery of the securities to Van Rensselaer, said, "Yes, that was all right." (Page 23.) This remark (if made) is explained by another portion of the evidence submitted by the plaintiff, viz., Hinchman's letter to Lincoln July 22d. (Page 17.) In it he wrote:—

"I told Mr. Van Rensselaer that he could receive the Stormont stock held by you for joint account of yourself and Stormont without requiring you to advance any more money, and that I would arrange with you about it; and he knowing that I was in negotiation with you, took charge of the whole as handed to him by Mr. Tyler, your counsel."

From this it appears that Van Rensselaer's agency and authority from Hinchman was limited to the receipt of a portion of the Bothwell securities for a specific purpose, and that purpose was *not for delivery to Hinchman, according to the terms of the contract alleged by the plaintiff.* The only other relevant evidence *received* bearing on the acceptance and receipt of the securities by Hinchman is the letter of

Van Rensselaer to Lincoln, November 20th, in response to the latter's demand for them. Van Rensselaer says :—

"In answer to the demand made upon me through Mr. M. W. Tyler, I beg to say that I *hold the securities* mentioned therein, *on behalf of yourself and Mr. C. S. Hinchman*, and I have no interest in or claim upon them personally. I have been notified by Mr. Hinchman not to deliver them to you, and for that reason shall not be able to accede to your demand. Any arrangement agreed to by yourself and Mr. Hinchman shall have my prompt acquiescence." (Pages 38, 39.)

There is here the most direct of statements that Van Rensselaer's position was as a holder of the securities for other interests than those of Hinchman alone. There is in it not the slightest evidence or ground for argument that Hinchman had accepted and received the securities under the terms of the alleged contract of July 7th. At best he stood as a joint claimant upon them with Lincoln. Acceptance and receipt of the securities by Hinchman alone was required, not a joint claim by him and the alleged vendor.

The other letters that passed between the parties are practically valueless for the plaintiff. Tyler, in his letter to Hinchman, July 21st (page 25), wrote :—

"On July 8th, learning from Mr. Van Rensselaer that you had left word with him to receive the securities, Dr. L. called on Mr. Van R. and left with him the securities just as he received them."

This, it was said by the court in the charge, should be considered by the jury in determining the fact of acceptance and receipt by Hinchman. It is plain that the extent of Van Rensselaer's authority to act for Hinchman in receiving the securities cannot be made out by the agent's own declarations. Van Rensselaer was at best a special agent of Hinchman or an agent for a special purpose, and had no apparent authority which might be calculated to mislead parties dealing with him (Van Rensselaer was an officer of the Stormont Company, and was not in the employ of Hinchman). His real authority, as stated in Hinchman's letter of July 22d

(page 17), which was limited to the receipt of the Stormont securities belonging in the Bothwell lot, is all that may be allowed to govern in the case.

Wharton on Agency, section 125, note 6;

People's Bank *vs.* Gayley, 92 Penna. St., 528–529.

It was error to permit any weight to be given to their declaration of authority by Van Rensselaer.

But conceding, for argument's sake only, that Tyler's statement of Van Rensselaer's authority to "receive" the securities was evidence, it is utterly useless to show that Hinchman *accepted and received* the securities, both of which facts would have to be made out before he could be charged. Mere delivery without acceptance is insufficient. Reed on Statute of Frauds, section 263, citing

Caulkins *vs.* Hellman, 47 N. Y., 449;

Heermance *vs.* Taylor, 14 Hun, 149;

Gorham *vs.* Fisher, 30 Vt., 428.

Further than has been indicated, there was not a particle of evidence introduced by the plaintiff tending to show receipt and acceptance of these securities under the verbal contract as sworn to by his witnesses. This evidence was wholly insufficient to submit to the jury. It was admitted by the defendant that part of the Bothwell securities, viz., the Stormont Company's stock, were delivered properly to Van Rensselaer. The plaintiff's own evidence showed that Van Rensselaer's authority was limited to the receipt of this portion of the securities. Acceptance by Hinchman there was none. On the contrary, the letters of the defendant which the plaintiff found it necessary to use to make out his case show that Hinchman did not accept the securities.

On July 21st, after the delivery of the securities, Hinchman wrote to Tyler: "I shall have to postpone our further negotiation until over next week. *Meanwhile, I will see that no action is taken which will cut out any rights of Dr. L.*" (Page 24). This was the first letter of importance written by Hinchman to either of the parties after the securities were handed to Van Rensselaer. The expression, *Meanwhile, I will see that no action is taken which will cut out any rights of Dr. L.*, shows that Hinchman did not accept the securities under the

terms of the alleged contract; for, had the securities been accepted, Dr. L.'s right to the securities would have ceased and become changed into a right of action against Hinchman for the payment of the purchase-money.

When we come to the evidence of the defendant we find it plainly and explicitly stated that Hinchman did not accept and did not authorize Van Rensselaer to accept the securities tendered to Van Rensselaer on July 7th. Hinchman, as president and trustee of the Stormont Company, writes to Van Rensselaer, the secretary and treasurer, under date of August 24th:—

"Dr. Lincoln, through his attorney, Col. M. W. Tyler, having seen fit to disavow the understanding and agreement by which he obtained his position in carrying the J. R. Bothwell securities in your hands, left there by Col. Tyler, after conference with a majority of our trustees, I am instructed to notify you to retain possession of said securities until a court of competent jurisdiction shall direct you what to do with them, I claiming, as a trustee for the benefit of Stormont Treasury, an equitable and *bona fide* interest therein." (Page 60.)

Upon this letter Hinchman is asked, "*Did you ever give Mr. Van Rensselaer any instructions as regards the delivery or non-delivery of the stock, except what is contained in that letter?*" His answer is, "*No, sir; I never did.*" (*Id.*)

This letter, and the question and answer following it, should be put alongside of the letter (Van Rensselaer to Lincoln) read in evidence for the plaintiff, November 20th, 1882. (Page 38.) With the terms of Van Rensselaer's authority thus explicitly given and limited, all argument is wide of the mark which seeks to show that Van Rensselaer's letter of November indicates an authority in him to accept the securities for Hinchman.

It is respectfully submitted that there was not only no sufficient evidence, but absolutely no evidence whatever for the plaintiff which showed or tended to show acceptance of those securities by Hinchman. Such evidence was vitally necessary for the submission of the case to the jury—the statute of frauds of New York requiring that in cases of parol contracts of sale, *receipt and acceptance* by the vendee must be proved before a recovery can be had.

The court therefore erred in declining to direct a verdict for the defendant at the close of the plaintiff's evidence.

Of the specific errors in the charge of the court, the fourth, fifth, and seventh assignments may be definitely noticed. They emphasize the error of the court in permitting the jury to find an acceptance and receipt of the securities notwithstanding the facts that:—

(1.) The receipt given by Van Rensselaer was conditional upon the money being paid, and no money was paid.

(2.) The receipt did not show acceptance and receipt by Hinchman.

(3.) Van Rensselaer had no authority to give the receipt. (Page 60.) He was a special agent (Letter, pages 17–18), and could not bind Hinchman beyond the terms of his authority, even had he assumed to bind him absolutely.

(4.) There was nothing in evidence sufficient to show a ratification by Hinchman of Van Rensselaer's act, indicating that he individually accepted and received the securities.

(5.) There was an absolute refusal by Hinchman to accept and receive the securities, which refusal was communicated to the plaintiff and his counsel as soon as he discovered that they proposed to "understand" the contract as a personal one. (Letter, page 17.)

(6.) Promptly upon the discovery of the claim by the plaintiff against the defendant, the Stormont Company adopted the defendant's act for it, and verified his position that he represented it in the transaction.

III.

The last assignment of error deserves consideration by itself, as perhaps upon this error the case itself turned. The assignment is: *The court below erred in admitting in evidence the receipt of Van Rensselaer, July 8th.* (Page 19.)

Van Rensselaer, it will be recollected, was the treasurer of the Stormont Company. His agency for Hinchman, as proved at the time of the offer of the receipt in evidence, was limited to *receiving the Stormont stock.* (Letter, pages 17-18.)

It was a special agency, and did not extend to signing a special receipt prepared by Tyler in accordance with his scheme to entrap Hinchman. Without an authority to sign this paper being first shown, the admission of this paper in evidence to bind Hinchman, and the reading it to the jury, was putting before the jury a statement which belonged out of the case. And there was not a particle of evidence that Hinchman ever admitted as binding on him or ratified the giving of this receipt, or gave to Van Rensselaer a general agency which could make it his own although given by Van Rensselaer. It should have been kept out of the jury box entirely. The error of admitting it in evidence was not mended by the court in the charge discussing the theories as to its meaning and stating the defendant's along with the plaintiff's theory. That was, if possible, only aggravating the error by calling the jury's attention to the receipt. At best it was a statement by Tyler and Lincoln which they induced Van Rensselaer, without authority, to sign, and its contents should have been studiously kept from the jury. For this error alone the case should be reversed.

The record of the case shows it to be one of those cases occasionally seen in practice, where artfulness temporarily prevails over honesty by the unintentional assistance of a court bewildered by theories of the case, and overlooking the real evidence in it and the rules of law applicable to it. If the evidence alone and the conditions and relations of all the parties be considered, it is believed there can be but one summary of the facts and one statement of the law applicable to it. Charles S. Hinchman did not personally agree to buy the securities, and he did not accept and receive them, and there was no sufficient evidence to warrant the jury in finding the contrary.

The conception of the case by the court, however, and its rulings on points of law, permitted such a finding, and for these the judgment, it is respectfully submitted, should be reversed.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1887.

No. 77.

CHARLES S. HINCHMAN,

Plaintiff in Error and Defendant below,

versus

RUFUS P. LINCOLN,

Defendant in Error and Plaintiff below.

Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR PLAINTIFF IN ERROR.

THEO. F. H. MEYER,

Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1887.

CHARLES S. HINCHMAN, Plaintiff in Error, *vs.* RUFUS P. LINCOLN, Defendant in Error.	No. 77.

Brief for the Plaintiff in Error.

For the purposes of this brief, the statement of the case and specifications of error set forth in the brief of the Honorable Wayne McVeagh and his associate, A. H. Wintersteen, Esq., are adopted and relied on.

ARGUMENT.

I.

Lincoln, the plaintiff in the Court below, and the defendant in error here, alleged in his complaint a

cause of action founded on contract, to wit: an agreement for the sale by Lincoln and the purchase by Hinchman, for the price of eighteen thousand dollars, of Lincoln's interest in certain securities (stocks and bonds). The answer of Hinchman, defendant in the Court below and plaintiff in error here, set up, what is, under the New York practice, equivalent to, a general denial.

The burden was therefore on Lincoln to produce at the trial such evidence as would satisfy the statute of frauds, or show the case not to be within the statute.

There is no pretence that the alleged agreement was in writing or that Hinchman (the party charged) subscribed any note or memorandum thereof, or made any payment whatever, but delivery is alleged in the complaint and relied on by Lincoln to make out a contract valid under the statute.

For that purpose it was necessary for Lincoln to show, that there was a delivery on his part, as well as an acceptance and receipt on Hinchman's part, of such a character, as to *unequivocally* place the subject of the alleged contract within the power, and under the *exclusive* dominion of Hinchman.

Shindler *vs.* Houston, 1 N. Y., 261, 269, 270, decided in April, 1848.

Brand *vs.* Focht, 1 Abb. Ct. Appls., Dec. 185, decided in June, 1867.

Rodgers *vs.* Phillips, 40 N. Y., 519, decided in June, 1869.

Marsh *vs.* Rouse, 44 N. Y., 643, 647, decided in Sept., 1871.

II.

To establish the delivery Lincoln produced the receipt of a third party, whom he asserted to have been Hinchman's agent.

This receipt is found on page 19 of the record, and constitutes substantially all that Lincoln relied upon to prove the requisite delivery and intent.

It was in writing, and it was therefore within the exclusive province of the Court, and the Court's duty, to construe this instrument and determine its effect.

> Foster *vs.* Berg, 14 Pittsbg. Leg. J'l. N. S., 188.

In connection with that proposition, this Court's attention is invited to the following:

> *First.*—In point of date the paper is the first piece of documentary evidence relating to the transactions out of which this litigation arose.
>
> *Second.*—It was prepared by, and in the handwriting of, Lincoln's lawyer (pp. 10, 19, 43), and it is clearly shown by Lincoln's own evidence that at the time this receipt was presented to Van Rensselaer, and signed by him, Hinchman was not present (p. 16), and had not seen the receipt.
>
> *Third.*—It was produced to charge Hinchman as part of Lincoln's case.

These circumstances (all established by Lincoln's

own evidence), it is submitted justify, the following conclusion :

> The paper embodied the gist of all that preceded its being given according to Lincoln's own understanding thereof and expressed correctly Lincoln's intent at the time.

It was said by the learned judge at the trial that this receipt seemed somewhat contradictory in its terms—Hinchman neither claimed nor admitted that it was,—yet if the learned judge was correct it was Lincoln's duty to make such explanation as was admissible, but no attempt to that effect was made on his behalf. He was content to rest his case on the receipt as it stood, *i. e.*, as it had been devised by his lawyer, and for this reason, as well as those already stated, it is submitted as a further proposition that this paper must be construed by the Court most strongly against Lincoln, and *thus* construed be held conclusive upon him.

III.

The receipt is written on the Stormont Company's paper, and dated July 8, 1882; omitting the letter-heading, date and list of securities, it reads as follows :

"Received of Dr. Rufus P. Lincoln the following
" certificates of stock on behalf of C. S. Hinchman,
" and to be delivered to him when he fulfills his con-

" tract with Dr. Lincoln to purchase said stock for
" $18,000, for

(List of securities.)

"SCHUYLER VAN RENSSELAER.

" Witness:
" M. W. TYLER."

It will be noticed that Van Rensselaer signs as an individual and that his signature is witnessed by Tyler, who had taken a prominent part in the transactions and conversations which preceded the receipt and was the author of it; indeed, Lincoln's "best man," lawyer and witness.

Consideration of this receipt may be properly divided into two parts:

First.—What it expressed on behalf of Lincoln who procured it, and on behalf of Van Rennselaer who signed it.

Second.—What is its correct construction.

It is quite apparent on the face of the receipt that Lincoln did not intend to *unequivocally* place the securities within the power and under the *exclusive* dominion of the alleged buyer personally.

They were "to be delivered" only "when," &c., which shows that delivery to Hinchman *personally* was "to be" made simultaneously with, or subsequent to the payment by him to Lincoln of $18,000.

It is, therefore, submitted that Lincoln's intent as shown by this receipt, was to retain some control or dominion over, or lien on or rights in the property and not to part with the title and possession

unequivocally, in fact, that he intended to remain the owner till Hinchman paid.

And that such was Lincoln's true intent is confirmed and corroborated by the demand which Lincoln made on Van Rensselaer individually on November 16, 1882, for the return of the securities "as Mr. Hinchman refused * * * to purchase certain securities delivered to *you* on the 8th day of July, 1882," thus plainly showing that Lincoln claimed to be the owner and entitled to the possession thereof.

Van Rensselaer, on the other hand, gave his personal receipt, whereby he became individually bound to perform a certain duty to Lincoln, which was inconsistent with his duties to Hinchman, if he had any, or acted as the latter's agent in receiving the securities.

That, however cannot be presumed from the face of the receipt, if the words "on behalf of C. S. Hinchman," which are the only words from which such a presumption could possibly arise, can be satisfactorily explained and given a meaning consistent with Van Rensselaer's duties.

To him the words meant simply that he received the securities individually as a stakeholder or middleman to hold for *both* the parties named.

That such was Van Rensselaer's understanding and intent, there can't be any doubt, Lincoln himself proved it, by his demand on Van Rensselaer individually as well as by producing in connection therewith a letter in which Van Rensselaer's position is defined as follows :

"DR. R. P. LINCOLN :

" Sir.—In answer to the demand made upon me " through Mr. M. W. Tyler, I beg to say that I

"hold the securities mentioned therein on behalf "of yourself and Mr. C. S. Hinchman."

This letter bears date November 20, 1882. It is true it was not written or signed by Van Rensselaer himself, but by his attorneys.

Lincoln, however, relied on it and a stipulation, to the effect that Van Rensselaer, if called, would testify that this letter was written and sent by his attorneys on his behalf and by his direction and that the *facts therein stated are true.*

The stipulation with the letter annexed may be found on pp. 45–46 of the record.

The words "to be delivered" in the personal receipt had the effect to create a trust, in the nature of a bailment in favor of Lincoln, with Van Rensselaer as bailee; they are incompatible on any theory with the claim that the delivery to Van Rensselaer was delivery to Hinchman, or that Van Rensselaer acted for Hinchman in receiving the securities.

The words "on behalf of Hinchman," in the receipt, are not inconsistent with such a trust or bailment. They designate only the person, who is to pay and to whom, upon or after payment, the bailee is to attorn; in short the receipt meant this: Van Rensselaer, acting individually and not in any representative capacity, acknowledged to have received the securities to hold for Lincoln till Hinchman pays and from thence forward for Hinchman.

And this construction is in entire harmony with the understanding and intent of the parties as shown by the receipt itself, the demand, Van Rensselaer's reply thereto and Lincoln's stipulation.

IV.

It will doubtlessly be attempted to sustain the delivery on the the theory that Van Rensselaer was Hinchman's agent.

Assuming he was, he had to act *as such* to affect his principal. But the theory that he *so* acted is, as already shown, not consistent with Lincoln's own acts, who took Van Rensselaer's *individual* receipt and bound him *personally* not to deliver to Hinchman unless he paid; who afterwards made demand on Van Rensselaer personally for the return of the securities which he says were "delivered to *you*."

It is, therefore, submitted, that there was no delivery to Hinchman, actual or constructive; the instruction to Van Rensselaer not to deliver unless the purchase money was paid was fatal.

2 Add. on Conts., pp. 113-115 citing.
Baldey *vs.* Parker, 2 B. & C., 37.
3 D. & R., 220.

Further, that there could not be any delivery to satisfy the statute as long as Lincoln retained ownership of or any dominion over the property, or even any lien thereon or rights therein.

It has been held that a vendor, to satisfy the statute, must surrender *all* right to stoppage *in transitu*.

Story on Sales, § 276, citing Bushel *vs.* Wheeler, 15 Q. B., 442.

The delivery must be such as to put a complete end to all the rights of an unpaid vendor.

2 Add. on Conts., § 554, p. 113, citing
Cusack *vs.* Robinson, 1 B. & S., 299.

The law seems to be the same in New York.

Shindler *vs.* Houston, 1 N. Y., 261.
Stone *vs.* Browning, 51 N. Y., 211.

It is therefore submitted that there was not any, and if any, not a sufficient delivery to unequivocally place the property or any part of it within the power and under the exclusive dominion of Hinchman.

V.

In the absence of any such delivery there could be no acceptance and receipt, or if there was an acceptance there could be no receipt by Hinchman of the property or any part of it because of the personal engagements of Van Rensselaer to Lincoln.

If it be claimed that Hinchman acquiesced, he acquiesced only in that which was insufficient to charge him.

As long as something remains to be done to complete the delivery by the vendor or effectuate the *receipt* by the vendee, the statute is not satisfied.

1 Chitty on Conts., p. 555 and cases there cited.
M. & T. Bank *vs.* F. & M. Nat'l B'k, 60 N. Y., 40.

And treatises and authorities cited above.

VI.

It is submitted that Lincoln failed to show any cause of action, and that the trial Court erred :

In not rejecting the receipt ;

In not dismissing the complaint when Lincoln rested ;

In not dismissing the complaint at the close of all the evidence ;

In leaving the construction of the receipt and other documentary evidence to the jury ; and

In submiting to the jury the question whether there was a delivery, acceptance and receipt sufficient to satisfy the requirements of the statute.

The propositions herein contained are covered by the exceptions on behalf of Hinchman (pages 19 and 47) ; also by the first, seventh, eighth and eleventh requests to charge made on Hinchman's behalf. The Court's refusal and the exceptions thereto.

Further by Hinchman's exceptions to the charge as made (page 125).

It is respectfully submitted that the judgment should be reversed.

THEODORE F. H. MEYER,
Of Counsel for Plaintiff
in Error.

124-38

124-38

Supreme Court of the United States.

~~NO. 357.~~

Oct. Term 1887. No 77.

CHARLES S. HINCHMAN, Plaintiff in Error,

against

RUFUS P. LINCOLN, Defendant in Error.

Brief for Defendant in Error.

AUGUSTUS C. BROWN,
Counsel for Defendant in Error.

Supreme Court of the United States.

CHARLES H. HINCHMAN,
Plaintiff in Error,

AGAINST

RUFUS P. LINCOLN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

This case comes before the Court upon a Writ of Error to the Circuit Court of the United States for the Southern District of New York.

The defendant in error, plaintiff below, brought the action December 5th, 1882 (p. 5), in the Circuit Court of the United States for the Southern District of New York, to recover the sum of $18,000, the purchase price of certain securities, stocks and bonds alleged to have been sold and delivered by him to the plaintiff in error, defendant below, on July 8th, 1882, together with interest on such purchase price from such date of sale and delivery, besides costs (pp. 4 and 5).

The complaint alleged, among other things, that the plaintiff was a citizen of the State of New York, and that the defendant was a citizen of the State of Pennsylvania, and that on July 8th, 1882, the plaintiff had in his possession the securities, stocks and bonds in question.

The answer was filed January 13th, 1883 (p. 6). It denied knowledge of plaintiff's citizenship, and denied that defendant was a citizen of Pennsylvania; admitted that on July 8th, 1882, plaintiff had possession of the securities, stocks and bonds described in the complaint, and then denied each and every allegation of the complaint not thereinbefore admitted or denied (p. 6).

The cause came on for trial before Hon. Alfred C. Coxe and a jury, at a Stated Term of said Circuit Court, on the 6th day of February, 1884, and on the 11th day of February, 1884, the jury rendered a verdict for the plaintiff for $19,719 (p. 7). Judgment was entered July 5th, 1884, for $20,312.11 (p. 7), and a Bill of Exceptions was regularly settled and signed (p. 9 to p. 126).

No Assignment of Errors was filed.

On the trial it was stipulated that plaintiff was a resident of New York, and the defendant a resident of New Jersey, and the pleadings were amended accordingly (p. 9.)

The leading facts established by the evidence, and by their verdict for the plaintiff necessarily found by the jury, and appearing in the record, are as follows:

On April 30th, 1882, one Bothwell, being indebted to the plaintiff in the sum of $11,500, assigned to him the securities in question, subject to a claim for about $12,000, (which afterwards proved to be $15,000, p. 13), of Messrs. Wells, Fargo & Co., by whom they were then held (pp. 11, 12).

On May 4th, 1882, the plaintiff, through his attorney, M. W. Tyler, and in presence of the defendant, paid the claim of Wells, Fargo & Co., amounting then to $15,000, and received the securities from the defendant, who, under some arrangement between himself and Wells, Fargo & Co., had obtained possession of them (p. 14.)

Between May 4th and July 7th, 1882, the plaintiff had agreed with the defendant, who was largely interested in the Stormont Silver Mining Company, in which plaintiff was also interested, and which was also a creditor of Bothwell,

that that company should have the benefit of any surplus proceeds of the securities remaining after the payment of the plaintiff's debt and advances, amounting together to $26,500 (p. 15).

On July 7th, 1882, Mr. Tyler, on behalf of the plaintiff, proposed to the defendant that he should purchase the securities from the plaintiff, and the defendant, after some negotiation, said "I will give him $18,000, for those securities." Mr. Tyler immediately consulted with the plaintiff, and then said to the defendant, "Dr. Lincoln accepts that offer; he will take $18,000, and give you the securities; when shall we close the transaction"? and defendant replied "come in to-morrow afternoon at 3 o'clock" (pp. 15 and 16).

Afterwards, and on the same day, the plaintiff said to the defendant, "I hear you have concluded to buy the Bothwell securities," and defendant replied "yes," and named the next afternoon at three o'clock as the time for closing the transaction, and the plaintiff said "we will come to-morrow afternoon at three o'clock and deliver them" (p. 16).

At some time before 3 o'clock the next day, the defendant authorized one Van Rensselaer to receive the securities or some of them. (Ex. 3, pp. 17 and 18).

On the afternoon of the next day, July 8th, 1882, at the defendant's office and in his absence, the plaintiff delivered the securities to Van Rensselaer (pp. 16, 17), and took a receipt from him for them, reading:

"Received of Dr. Rufus P. Lincoln the following certificates of stocks on behalf of C. S. Hinchman, and to be delivered to him when he fulfills his contract with Dr. Lincoln to purchase said stocks for $18,000," and then followed a list of the securities mentioned in the complaint (p. 19).

Within a few days after it was given, the defendant saw the receipt which Van Rensselaer had given to the plaintiff (p.58), and did not object to it, or to the form of it (p. 21).

On July 20th Mr. Tyler told defendant that they had delivered the Bothwell securities to Van Rensselaer, and he replied "yes, that was all right" (p. 23).

About August 1st, 1882, at Long Branch, New Jersey, the defendant said to the witness Myer, when introducing the plaintiff to him, "This is Dr. Lincoln, from whom I have the Bothwell securities" (pp. 43, 45).

At some time prior to November 20th, 1882, and doubtless as early as August 24th, 1882 (Ex. C, p. 60), the defendant instructed Van Rensselaer not to surrender these securities to the plainttiff. and notified him that he, defendant, had an interest in them (Exs. 15 and 16, p. 38, and stipulation pp. 45 and 46. Ex. C, p. 60).

A long correspondence was had between Mr. Tyler and the defendant, in all of which the securities were mentioned as the "Bothwell securities," and no intimation was thrown out that they were not the securities agreed to be purchased, or that the defendant did not in fact have or control them, but the $18,000 was never paid (Ex. 3, p. 19, Ex. 4, p. 20; Exs. 5 and 6, p. 22; Ex. 7, p. 24; Ex. 8, p. 25; Ex. 9, p. 26; Ex. 10, p. 28; Exs. 11 and 12, p, 31; Ex. 13, p. 35; Ex. 14, p. 36).

Thirty-one exceptions were taken by the defendant on the trial, some to the rulings of the Court in receiving or excluding evidence; some to its refusal to adopt certain propositions of law, and some to its propositions of law as laid down, but in the absence of an Assignment of Errors such as is required by Sec. 997 of the Revised Statutes, it is impossible to know upon precisely what exceptions the plaintiff in error relies.

The contest below, however, was upon two questions, first, whether the defendant negotiated for the purchase of the securities in his individual capacity or as a trustee of the Stormont Company, and, second, whether the alleged contract was valid under the Statute of Frauds

Points.

I.—The Writ of Error should be dismissed because of the failure of the appellant to annex to the transcript of the record, an Assignment of Errors, as required by Sec. 997 of the Revised Statutes.

We are aware that this Court has not been accustomed very rigidly to enforce compliance with the statute, but we think this is a good case with which to inaugurate a new era. Here are thirty-one exceptions, and the appellee cannot know which ones the appellant intends to rely upon. The consequence is he must devote more or less attention to each, and burden the Court with a mass of matter, much of which may become entirely immaterial when the argument is reached. It does not meet either the letter or spirit of the requirement to file an Assignment with the appellant's brief six days before argument, since briefs of appellees, as matter of fact, are usually prepared some time prior to a cause being reached. Were the statute enforced much valuable time would be saved to Court and counsel.

II.—The exceptions to rulings upon evidence relating to the question, whether the defendant negotiated for the purchase of the securities in his individual capacity or as trustee for the Stormont Company, are each untenable.

The question in such case is to whom was the credit given, and that was for the jury to decide.

Wharton on Agency, § 490.
Pentz *v.* Stanton, 10 Wendell, 271.

Two of such exceptions appear on page 49, and the evidence called for was not only immaterial but incompetent. It had nothing to do with the transactions between plaintiff and defendant, of July 7th and 8th ; there was no offer to show that plaintiff ever had any knowledge of the sub-

jects inquired about, and both questions in fact called merely for the mental operation of defendant, as, aside from the form of the questions, it appeared on page 78 that he himself furnished the money.

Three of such exceptions appear on page 52. The evidence sought by the first two questions was clearly incompetent, for the reason that the records of the company were the best evidence of the facts, and all three questions were immaterial on the issue of the defendant's trusteeship. But whether so or not, no harm was done, as all the facts called for subsequently got before the jury (See pp. 53, 54, 55, &c.)

Gregg *v.* Moss, 14 Wall., 564.

The ruling on page 59 was harmless. The answer was not responsive to the question, and the evidence was *res inter alios*, but it remained before the jury and was not stricken out.

It is not quite clear what the exception on page 95 points to, but if to the admission of the circular it came too late, for the circular was already in without objection (Matter of Morgan, 104 N. Y., 74, 86), and besides, that document was clearly competent for the reasons stated. It was a paper signed by defendant as an officer of the company, purporting to inform the stockholders of the financial condition of the company, and the omission of any reference to the Bothwell securities, or any interest of the company therein, was a significant fact bearing upon the probability of defendant's story, that prior to its date he had all along been acting for the company in reference to them, instead of for himself.

The evidence excluded at page 99 would manifestly have been improper. Instead of examining his own witness as to the facts, he reads a statement made by another person as to what the defendant had said at another time and place, and then asked the defendant if that was "a fair history" of the facts. As well might counsel himself have put all the facts, as he claimed them to be, into nar-

rative form, and then called on his client to indorse the statement as "a fair history." It is not thought that the appellant will seriously insist on the legitimacy of this mode of examination, but if he does, it is proper to add that the statement was merely a repetition of what was contained in defendant's letter (Ex. 14, p. 36), already in evidence, and of his own previous oral testimony (pp. 40, 50, 64, 65).

There having been no error committed in the receipt or rejection of evidence on the point, the verdict of the jury, that the defendant negotiated for the purchase of the securities in his individual capacity, is conclusive.

Basset *v.* United States, 9 Wall., 38.
Gregg *v.* Moss, 14 *id.*, 564.
Taylor *v.* Angevine, 8 Rep., 643.

III.—There was no error in the receipt or rejection of evidence bearing upon the question of sale and delivery.

The receipt at page 19 was properly admitted. The defendant, in Ex. 3, page 17, admitted that he had made Van Rensselaer his agent to receive the Stormont stock, and it was competent to show what the agent did.

The evidence on page 39 of an assessment of 25 per cent. was entirely harmless. It was a part of the plan all the details of which were afterwards given in evidence by the defendant in support of his defence (pp. 55, 57).

The ruling on page 46 in no way prejudiced the defendant. On whose behalf Van Rensselaer claimed to hold the securities, or what he would do if the parties agreed, was entirely immaterial, but in point of fact *the whole letter was already in evidence* (p. 38).

The admission of the postscript to the letter on page 69 was proper. Defendant had admitted that Van Rensselaer was his agent to receive the Stormont stock (Ex. 3, p. 17). That agent had given a receipt to the plain-

tiff (Ex. 15, p. 38). Defendant had sworn that that agent showed him a copy of the receipt in Tyler's handwriting within a week after it was given (p. 58), and this postscript proved that the agent did not get the copy, and could not, therefore, have shown it until more than two months after the receipt was given.

IV.—The rulings of the Court upon the defendant's requests to charge were right.

The *First* request had been in substance charged by the Court (pp. 114, 115, 120, 121 and 122).

So had the *Second* (pp. 121, 122).

So had the *Third* (p. 122).

The *Fourth* request was not sound law.

Brown on Stat. of Frauds, Sec. 326, a, *infra.*

The *Fifth* had been charged in terms (p. 121).

The *Sixth* was in substance charged at pages 121 and 122.

The *Seventh*, *Eighth* and *Ninth* had been covered by the charge on page 120.

The *Tenth* was in effect embraced in the charge at pages 119, 121, 122.

The *Eleventh* was in substance a request to direct a verdict for the defendant, and a compliance would have been error on the facts stated in the recitals at the head of these Points, under the law as cited in Point VI, *infra.*

When the Judge has already charged substantially the same proposition, an exception to a refusal to charge as requested is unavailing,

Packalinsky *v.* N. Y. C., &c., RR., 18 Weekly Di., 44.

But none of the exceptions taken to the refusals of the

Court to charge as requested, can by possibility avail the appellant. In every instance the Court "declined to charge said request except as already charged." If counsel for the appellant on that announcement thought that the Court had not "already charged" the proposition in substance, it was his duty to call the attention of the Court to the distinction which he claimed to exist between the charge as made and the charge as requested. He had no right to leave the Court under the impression that the point had already been covered, by omitting to specify wherein it was not covered. Such practice has always been condemned by the courts.

Zabriskie *v.* Smith, 13 N. Y., 322, 338.
Betz *v.* Conner, 7 Daly, 550, 558.
Walsh *v.* Kelley, 40 N. Y., 556, 558.
Ayrault *v.* Pacific Bank, 47 N. Y., 570, 576.
Schile *v.* Brokhahus, 80 N. Y., 614, 620.

V.—The exceptions to the charge as made were groundless.

As to the first and second exceptions on page 125, there was a dispute as to the facts. The plaintiff swore to an admission of defendant on August 1st, that he then had the securities (pp. 43, 45), and claimed that after he received this information he ratified the act of Van Rensselaer in delivering them to the defendant. The defendant swore that he made no such admission (p. 61), and claimed that the exercise by him of dominion over the securities as shown by his letter, Ex. C. (p. 60), and his evidence (pp. 89, 90), was as Trustee of the Stormont Company, and it was clearly for the jury to say whether he had the securities, and if so, in what capacity he held or controlled them, and whether the plaintiff had approved his possession, and whether the circumstances proved, of defendant's acting

or forbearing to act, did or did not amount to an acceptance.

Pentz *v.* Stanton, 10 Wendell, 271.
Garfield *v.* Paris, 96 U. S., 557, 563, *infra.*

As to the third exception (p. 125) it seems to be a quibble on words. The Court left it to the jury to say, first, whether there was a contract, and second, if there was, whether or not the circumstances brought it within the requirements of the statute as explained to them (p. 115).

As to the fourth and fifth exceptions (p. 126) the judge made no such charge as is professedly quoted. He only said *that the plaintiff insisted* on those propositions (p. 120).

The portion of the charge referred to in the sixth exception is found on page 122. The defendant had admitted authority in Van Rensselaer to receive some of the securities (and authority to receive a part was as good as authority to receive the whole, so far as the statute is concerned) and had admitted in himself possession and control of the whole, and the clause excepted to followed a very full statement of the contradictory facts in proof, and left it to the jury to determine the position of Van Rensselaer, and the force and effect of his acts, on the question of receipt and acceptance.

VI.—There having been no error in the admission or rejection of evidence, and no misdirection to the jury, the exception to the refusal of the Court to direct a verdict for the defendant (p. 47), and the exception to its refusal to charge the eleventh request (p. 125), that there was no evidence of a completed sale to the defendant, are without merit.

When the plaintiff rested, every one of the facts stated at the head of these Points was in evidence, except the

single fact that defendant had seen the Van Rensselaer receipt, and, of course, when the case was closed, all of these facts were before the jury, and we respectfully submit that these facts, if believed, justified a verdict of a completed sale of the securities by the plaintiff to the defendant individually.

First.—The testimony of Mr. Tyler and of the plaintiff as to what occurred on July 7th (pp. 15, 16) and the testimony of the plaintiff as to the defendant's admission of possession on August 1st (pp. 43, 45) being believed, it is clear that the transaction was between plaintiff and defendant individually. Tyler said to the defendant: "why don't you buy?" Defendant said: "*I* will give." Tyler said: "Dr. Lincoln accepts *that offer*; he will take $18,000 and give *you* the securities." The doctor said to the defendant: "I hear *you* have concluded to buy," and defendant replied, "Yes." The doctor said: "When will *you* close the transaction?" and defendant said: "*I* have appointed tomorrow;" and three weeks afterwards the defendant said to Meyer: "*I* have the Bothwell securities."

The defendant's declarations, contained in his letters put in evidence by the plaintiff, touching the capacity in which he claimed to be acting, did not bind the plaintiff, or operate to weaken the oral testimony already given. His letters were presented to the jury as a part of the correspondence between the parties which was had after the personal transactions, and it was only the uncontradicted declarations of the defendant, and the conclusions to be drawn from the whole correspondence on both sides, which bound the plaintiff; such, for instance, as that the defendant had authorized Van Rensselaer to receive the securities, and that they had got into defendant's possession or under his control.

Second.—The contract sued on was not within the Statute of Frauds. If the jury, upon sufficient evidence, should find that the defendant individually was the "buyer," and if he "accepted and received" any part of the securities, he would be deemed to have accepted and received in that capacity, since the jury would decide that there was no other contract between the parties.

Acceptance, in a case where the contract is for a specific, ascertained, chattel may precede receipt.

Cross *v.* O'Donnell, 44 N. Y., 661, 664.
Cooke *v.* Millard, 65 *Id.*, 354, 369.

It need not be at the time of the oral agreement.

Jackson *v.* Tupper, 101 N. Y., 515, 519.

The acceptance required by the statute is simply the *identification and recognition* of the goods in question as the goods which are to belong to the buyer by virtue of the agreement.

Browne on Stat. of Frauds, 4th Ed., Sec. 316 b.

"When at the time of the sale, the thing sold is definite and specific, and nothing remains to be done in the way of preparation or selection from a mass, the same evidence that would prove the making of the sale, whereby the title would pass, will ordinarily be sufficient to show an acceptance by the buyer such as would satisfy the statute," and the acceptance may be complete when the bargain is made.

Browne on Stat. of Frauds, 4th Ed., Sec. 316, e.
id. Sec. 321, a.
Cusack *v.* Robinson, 1 Best & Smith, 299.
Bog Lead Mining Co. *v.* Montague, Com. Bench, N. S., 489.

"Even when the nature of the goods is such that something subsequent to the making of the contract,

in the way of acceptance by the buyer, is necessary to sustain the contract, that something may be inferred from his silence and failure to act, as well as from what he does and says.

Browne on Stat. of Frauds, 4th Ed., Sec. 316, g.
id. Sec. 321, e.

A subsequent delivery is sufficient.

Sale *v.* Darrah, 2 Hilt., 184.
Boutwell *v.* O'Keefe, 32 Barb., 434.
Woodford *v.* Patterson, *id.*, 630.
McKnight *v.* Dunlop, 5 N. Y., 537.

If the goods are in fact received, no matter if there is a dispute as to what the contract was under which they were delivered, the Statute of Frauds which requires acceptance and receipt, is complied with and the contract validated. The verdict of the jury determines what the contract was, and that the receipt, if found, was under that contract.

Browne on Stat. of Frauds, 4th Ed., Sec. 326, a.
Tompkins *v.* Straight, 17 C. B., 697.
S. C. 25 L. J., C. P., 85.
Benjamin on Sales, Sec. 170.

After acceptance by the buyer, delivery to a carrier designated by him will answer the requirements of the Statute.
Cross *v.* O'Donnell, 44 N. Y., 661.

A. ordered books of B. to be delivered to C., who was to forward them to D. Held, that a delivery to C. was a good delivery to A. and an acceptance by him.

Dyer *v.* Forrest, 2 Abbt., 282.

Goods bought on an oral order were shipped to defendant. They were received by another who

took charge of them. They were seen in his possession by defendant, who made no objection, and were distributed as prizes at a fair of an association of which the defendant and the receiver were members. Held, that there was evidence sustaining a verdict that the receiver was authorized to "accept and receive" for defendant.

Wilcox Silver Plate Co. *v.* Green, 72 N. Y., 17.

If the buyer has taken possession, and merely remains under an engagement restricting his use or disposition of the goods until payment of the price, that restriction will not, it seems, be deemed inconsistent with his having received them so as to conclude the contract.

Browne on Stat. of Frauds (4th Ed.), Sec. 317 a.

It is not necessary that the *title* actually pass at the time of delivery.

Pinkham *v.* Mattox, 53 N. H., 600.
Doudsley *v.* Varley, 12 Ad. & El., 632.

Dealing with a commodity as if it was in his possession, is evidence of receipt.

Chaplin *v.* Rogers, 1 East., 192, 195.

Retaining and using property after its receipt is an acceptance.

Matter of Hoover, 33 Hun, 553, 555.

"If the vendee does any act to the goods—of wrong, if he is not the owner of the goods, and of right if he is the owner of the goods—the doing of that act is evidence that he has accepted them."

Parker *v.* Waltis, 5 E. & B., 21.

"The law is well settled that an acceptance sufficient to satisfy the Statute may be constructive, the rule being that the question is for the jury whether

the circumstances proved, of acting or forbearing to act, do or do not amount to an acceptance within the Statute. * * * Questions of the kind are undoubtedly for the jury, and it is well settled that any acts of the parties indicative of ownership by the vendee, may be given in evidence to show the receipt and acceptance of the goods, to take the case out of the Statute of Frauds."

Garfield *v.* Paris, 96 U. S., 557, 563.

Under these authorities there was, in the case at bar, "acceptance" at the time the contract was made because, the securities were definite and specific, and were identified and recognized by the defendant as those which but a few days before he had had in his posession and had delivered to the plaintiff, and the object of the contract was to restore them to the defendant discharged of the plaintiff's claim.

There was also "acceptance" after the securities passed from the plaintiff's possession, because the defendant admitted that he had "the Bothwell securities;" and after he had seen Van Rensselaer's receipt specifying them, he directed that gentleman not to surrender them to the plaintiff.

"Acceptance" was also shown by his retaining control of the securities during the long correspondence which ensued, and until suit was brought, without once intimating that they were not what he had bargained for.

"Lapse of time connected with other circumstances may show an acceptance."

Bushel *v.* Whelee, 15 Q. B., 442.

"Detention of the goods for a long and unreasonable time by the vendee, is evidence that he has accepted them."

Parker *v.* Wallis, 5 E. & B., 21.

That there was "receipt" by the defendant is evident from his admission that he had the securities, and from his assuming control of them and prohibiting their delivery to plaintiff.

It does not avail the defendant to say that he had them, or exercised dominion over them, as a trustee, since the verdict of the jury as to what the contract was determined in what character the securities were received or dealt with. (Browne, *supra*, Sec. 326, a.)

Nor does it avail him to say that the delivery by plaintiff to Van Rensselaer was not, in view of the form of the receipt, a delivery to the defendant, for it was entirely competent for the plaintiff, after he learned by the defendant's letter of July 22d (p. 17), that Van Rensselaer had been previously authorized to receive the securities for the defendant, to treat the delivery of July 8th as a delivery to defendant, and to notify defendant of that fact, and this he did by the letters of his attorney, of July 24th (p. 28) and August 3d (p. 31). And even if Van Rensselaer be considered as the agent of the plaintiff, the plaintiff had the right to adopt and approve his acts in surrendering possession or control to the defendant, and that he had done so was evidenced by his commencement of this action on the contract, and not for a conversion or to recover the securities.

VII.—The judgment should be affimed with costs.

A. C. BROWN,
Of Counsel for Deft. in Error.

4/24-38

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1887.

No. 77.

CHARLES S. HINCHMAN,

Plaintiff in Error and Defendant below,

versus

RUFUS P. LINCOLN,

Defendant in Error and Plaintiff below.

Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

THEO. F. H. MEYER,
WAYNE MACVEAGH,
Of Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

CHARLES S. HINCHMAN, Plaintiff in Error, *against* RUFUS P. LINCOLN, Defendant in Error.	October Term, 1887, No. 77.

Brief in reply for the Plaintiff in Error.

I.

With reference to the first point made by the learned counsel for the defendant in error, it is submitted, that nothing has been shown to take this case out of the rule laid down by this Court in School District of Ackley *vs.* Hall, 106 U. S., 428.

II.

In his presentation of the case on its merits, the

learned counsel for Lincoln seems to lay particular stress upon the question which arose on the trial as to whether Hinchman acted in his individual capacity or as Trustee for the Stormont Company, and the determination of that question by the jury as shown by their verdict, but it is evident that this determination cannot be upheld, if on the facts proven, the trial Court was wrong in throwing the burden of proof on the defendant. In this connection it is submitted that the statement of the case made on behalf of the defendant in error does not show all the facts which bear on this question and appear upon the record.

The complaint in this action shows that Lincoln agreed with reference to the very subject of this dispute that he would pay over to the Stormont Company any surplus derived in any way from the securities after having reimbursed himself in about $26,000 and interest for certain advances made by him to and for account of Bothwell.

Complaint fol. 10, pp. 4, 5.
Tyler's testy., pp. 14, 15.

This agreement it appears was made about the 4th of May, 1882, by Hinchman on the one hand, and Tyler under authority from Lincoln on the other (p. 15). It appears that Tyler, who was employed by Lincoln (p. 10), knew that Hinchman acted in a representative capacity, for he testified (p. 13) referring to Hinchman. "He wished Dr. Lincoln would make some arrangement with the *Stormont Company* * * * if *they* would surrender the securities."

Hinchman testified, and it was not met on rebuttal, that he was President of the Stormont Company and that Van Rensselaer was its secre-

tary and treasurer and that these facts were known to Tyler & Lincoln (p. 53).

In view of which it was error for the Court below to exclude the testimony offered on behalf of Hinchman to show for whom he had acted in getting the securities, and in subsequently, on May 4, '82, surrendering them to Lincoln.

It also appears, that, on, or about, the 3d of May Hinchman and Van Rensselaer were appointed a committee to devise and carry out some plan for relieving the Stormont Company of its embarrassment occasioned by the defalcation of Clark & Bothwell, who misappropriated $76,000 of its assets and allowed debts to accumulate and ripen into judgments, on one or more of which executions had been issued, whereunder levies had been made on the company's properties in Utah.

Def. Ex. D, pp. 61, 62.

Further that this committee finding the aggregate amount of judgments much in excess of the amount supposed, bought in the property at execution sale, and secured assignments of certain other judgments, with money raised by them for the purpose; thereupon created a new company under the laws of Utah and caused the property so purchased to be conveyed to that company and that on or about July 1, 1882, the holders of the old company's stock were by circular, invited to participate in the reorganization on the basis of a *pro rata* contribution of 25 cents per share, payable before July 22d.

Hinchman and Van Rensselaer acting as committee and as directors and officers of both the old and new concerns.

This circular after referring to the indebtedness

of Clark & Bothwell contains the following passage: "The probability of realizing any such sum "from the assets of the firm is very slight. At "the same time *we intend to obtain every thing* "*possible.*" (*Plff. Exh.* 14 pp. 92, 93, 94).

Lincoln & Tyler knew all these facts; there is no conflict of evidence on that question.

It further appears that Lincoln complained he sold "his position" with reference to the same subject matter in respect whereto he had but a few days before the alleged sale, dealt with Hinchman only in his capacity as trustee for the Stormont Company and finally that all the conversations prior to August 1st, on which Lincoln relies were had with persons who were Stormont Company's officers or directors, at the Stormont Company's office and that at that same office Lincoln delivered the securities to Van Rensselaer who was the Stormont Company's Treasurer and Secretary, a member of the Board of Directors and one of the reorganization committee.

It is submitted that these facts raise a presumption in favor of Hinchman's contention which was *strengthened* by the letter of July 22, written by Hinchman to Lincoln (*Plff's Exh.* 3, pp. 17, 18), for the verbal communication therein referred to related (as shown by the letter) to the receipt of old Stormont stock without at the same time exacting payment of the *pro rata* contribution, and was between persons charged with carrying out the plan of reorganization; the inference is therefore, that it was between them in their representative characters whether as officers of a company or as committeemen.

It is submitted that in view of what thus appears, the burden was on Lincoln to prove that

Hinchman *did not* act in a representative capacity and that the trial Court erred in charging the jury to the reverse effect.

Lincoln was, in view of these facts, not justified in dealing in the matter complained of with Hinchman as a principal.

Had Hinchman made a part payment, and Lincoln failed to deliver the securities, and the facts otherwise had been the same, there could be no doubt that the Stormont Company might have held Lincoln liable. He had sufficient information to put him on his inquiry.

Wright *vs.* Cabot, 89 N. Y., 570.

Where goods are purchased on credit by a known agent for the use of his principal, the presumption is, that credit was given to the latter.

Butler *vs.* Evening Mail Ass'n, 61 N. Y., 634.

III

It would seem, however, that the question whether Hinchman acted in one capacity or another loses some of its importance, if as the plaintiff in error contends:

There was not any, and if any, not sufficient evidence to prove by acts of the parties such a delivery, acceptance and receipt as to unequivocally place the secureties within the power and under the exclusive dominion of Hinchman, and that therefore, the trial Court ought, as a matter of law, to have non-suited Lincoln or directed a verdict for Hinchman.

It is respectfully insisted that the facts proven and relied on by the learned Counsel for Lincoln do not sustain him in his counter propositions.

On the question whether Van Rensselaer acted as Hinchman's agent in receiving the securities the learned Counsel relies on plaintiff's Exhibit 3 (pp. 17, 18).

This is the letter dated July 22nd, 1882, written by Hinchman to Lincoln, above referred to, which showed, if any, only a *limited* authority in Van Rensselaer, to receive *particular* stock for *specified* purposes, and *nothing* to warrant the conclusion that Hinchman had conferred on Van Rensselaer any authority to act for him as an individual; that this particular stock happened to be part of the securities which Lincoln said were the subject of a bargain between himself and Hinchman, is *immaterial*, because the purposes for which Lincoln claimed to have delivered to Van Rensselaer, *all* of the securities, and those for which Hinchman wrote him VanRensselaer *might* have received a *particular part*, are widely different.

Van Rensselaer could not bind Hinchman if he received more than, or the particular securities for purposes other than, those specified by Hinchman; the same reasons render untenable the claim that it was competent for Lincoln, after receiving the letter of July 22nd, to treat the delivery to Van Rensselaer as a delivery to Hinchman under the alleged verbal agreement of sale.

The learned counsel for Lincoln seems to realize that Lincoln's own evidence does not sustain but refute the theory that Van Rensselaer acted as Hinchman's agent in receiving the securities, and he therefore claims in effect that outside of this question the evidence is sufficient to sustain the

verdict and argues that if Van Rensselaer be considered the agent of Lincoln, then Lincoln had the right to adopt and approve his acts, but it is quite evident that this claim can be available only if there was satisfactory evidence that Lincoln or his agent delivered and Hinchman accepted and in fact received the securities.

All there is in the record that could possibly be of any advantage to his contention on these points, was stated by the learned counsel, in a very concise and adroit form, on pp. 3 and 4 of his brief.

After reciting the receipt the counsel says:

"Within a few days after it was given, the defendant saw the receipt which Van Rensselaer had given to the plaintiff (p. 58) and did not object to it, or to the form of it (p. 21)."

"On July 20th, Mr. Tyler told defendant that they had delivered the Bothwell securities to Van Rensselaer, and he replied: 'Yes, that was all right' (p. 23),"

"About August 1, 1882, at * * * the defendant said to the witness Meyer, when introducing the plaintiff to him: 'This is Dr. Lincoln, from whom I have the Bothwell securities' (pp. 43, 45)."

"At some time prior to November 20th, 1882, and doubtless as early as August 24th, 1882 (Ex. C., p. 60), the defendant instructed Van Rensselear not to surrender these securities to the plaintiff, and notified him that he, defendant, had an interest in them (Exs. 15 and 16, p. 38, and stipulation pp. 45 and 46, Ex. C p. 60)."

"No intimation was thrown out that they were not the securities agreed to be purchased, or that the defendant did not in fact have control of them."

It is submitted that these facts, adopting them as stated by the learned counsel, are not evidence of either an acceptance or a receipt by Hinchman of the securities.

There was no obligation on Hinchman to object to the receipt and no reason, therefore, why he should, the receipt was insufficient to charge him. Silence or forbearance to act become elements only when there is a duty to speak or act.

Lincoln could not prove acceptance and receipt or either by *words* spoken by Hinchman unless he proved *acts* in addition.

In the case of Dedrich *et al.* against Leonard (N. Y. Supreme Court) decided in November 1886, and reported in 3 N. Y., State Rep., 780, it appeared that an oral agreement had been made between the plaintiff and defendant for the sale by the former and purchase by the latter of a certain quantity of hickory sticks called "butts." The plaintiff procured the butts and pursuant to the agreement took them down to a point on Lake Champlain and notified the defendant, who afterwards came over and with the plaintiff measured them. The evidence was contradictory as to what was said at that interview.

The plaintiff claimed that the defendant had pronounced the butts "all right," and ordering a boat to ship them, had designated the property to be shipped as the butts "which I bought from Dedrich & Burgess."

The defendant claimed that he had pronounced the butts unsuitable, the place inconvenient and had refused to accept them.

There was a judgment for the plaintiff, but on

appeal the judgment was reversed. The Cour saying: We are satisfied that there was *no act* of the defendant which showed an acceptance and reception of the sticks.

Thus he was not bound by the verbal agreement * * * adopting the plaintiff's testimony as correct * * * everything remained in words, nothing was done. The defendant received no part of the goods, and took possession of no part.

Also Brabin *vs.* Hyde, 32 N.Y., 519, 522.

On referring to Defendant's Exhibit "C," (p. 60), which is relied on to prove that Hinchman dealt with the securities and *retained* them, (notwithstanding there was no proof that he ever *received* them), it will appear that the latter, as president of, or trustee for, the Stormont Company claimed an equitable interest in the securities for the benefit of the Stormont Company and notified Van Rensselaer not to part with their possession until directed by a Court what to do with them, assigning as a reason, that Lincoln had disavowed the agreement of May 3d, or 4th, which preceded the alleged contract of July 7th or 8th, and was independent thereof.

It is perfectly evident that this letter or notice did not amount to such a dealing with the securities as to make the alleged contract for a sale and purchase of Lincoln's "position" binding upon Hinchman or to render him individually liable.

There was no act of ownership but only a claim of an equitable interest for the benefit of a third party.

There is no evidence that Hinchman individually or otherwise did any other act.

In this notice Hinchman asserted some right un-

der an agreement which Lincoln concedes existed at the time the alleged contract of sale was made.

In the matter of Hoover 33 Hun, 553, a bailee in possesion of property, with power to sell and apply on his debt, subsequently verbally agreed to take the property in satisfaction on the debt; later on he sold the property and claimed a deficiency. The Court held that the sale by him of the property was not evidence of ownership as it was consistent with his rights as bailee, and did not permit the conclusion that he had by any *act* accepted the property under the oral agreement of sale.

This case, tho' cited by the learned counsel, seems to fully sustain Hinchman's position.

There must be some act *in recognition* of the alleged verbal contract.

None of the authorities cited by the learned counsel for Lincoln are in conflict with these propositions.

In the case reported in 12 Ad. and El., 632 the buyer received the goods weighed and repacked them and mixed them with his own.

In the case reported 53 N. H., 600 a piano was sold on installments, there was no dispute, on the facts that the buyer had possession of the piano and had used it and paid one or more installments.

In the case reported in 1 East.,192, 195, the buyer resold to a third party part of the goods while they remained in the custody of the seller.

In the case reported in 5 E. & B ,21 there was a dealing with the goods more extensive than was necessary to ascertain their condition.

In Garfield *vs.* Paris 96 U. S. 557, it was proved and not denied that the buyer had received per-

tain labels and the contention was that receipt of the labels did not take the case out of the statute of frauds, as the buyer had a right to object to the quality of the goods. But it was also shown that the buyer had by correspondence affirmed the bargain and after receiving the goods had resold them without making objection to their quality.

In Wilcox S. P. Co. *vs.* Green 72 N. Y. 17 it was proven that the goods were received by a third party and appropriated to the purposes for which they had been bought (premiums at a fair) with the knowledge of the buyer.

The foregoing, it is submitted, also disposes of the last statement of Lincoln's counsel.

Hinchman was under no obligation to disprove what Lincoln was required and failed to prove.

IV.

While it is submitted that the foregoing presents complete answers to the various claims of Lincoln's counsel, it will not be improper, in view of the somewhat involved argument, to call attention to certain facts which appear on the record, and to certain omissions to prove what Lincoln ought to have proved. The additional facts are:

The verbal admission alleged to have been made by Hinchman was denied by him (p. 61) and his witness (p. 104) and only supported by Lincoln's own testimony.

Lincoln himself did not rely upon the alleged verbal admission and did not believe that the secur-

ities had been, in fact, surrendered to Hinchman, and had not ratified, and did not ratify such surrender, if he believed one had been made.

(See Plff's Exh. 15, p. 38.)

More than three months after the alleged verbal admission, Lincoln made a demand in writing on Van Rensselaer, *personally*, for the return of the securities which "were delivered *to you* on July 8th."

On Nov. 20, five days before the commencement on this action, Van Rensselaer held the securities.

Plff's Exh. 10, pp. 38, 39,

Which was admitted under stipulation (p. 45), and is Van Rensselaer's reply to Lincoln's demand, wherein he says: "*I hold*" the securities. The verb is in the present tense.

The omissions are:

There is not a scintilla of evidence that Lincoln ever, prior to the commencement of this action, or at any other time, released Van Rensselaer from his personal obligation not to deliver to Hinchman, unless he paid.

There is, also, no evidence whatever that Van Rensselaer ever, parted with the securities, he held them on Nov. 20.

The presumption of continuance is not, in any wise, met or overcome.

The claims made by the learned counsel, on the one hand, that Lincoln, assuming he had the right had elected to treat the delivery to Van Rensselaer as a delivery to Hinchman, under the verbal agreement; and, on the other hand, that he Van Rensse-

laer had surrendered to Hinchman, and that Lincoln had approved such surrender—by commencing this action, are both equally groundless.

V.

As there may be an acceptance without a receipt and a receipt without an acceptance, both must be proven.

Cross *vs.* O'Donnell, 44 N. Y., 661.
Cooke *vs.* Millard, 65 N. Y., 354.

Whether in view of the character of the property there was an acceptance in such a sense as to estop Hinchman from disputing that the securities delivered to Van Rensselaer were the "Bothwell securities," will not be considered, though there is ample room for argument; assuming, that in fact they were, there was no proof of any such acceptance as amounted to a recognition of the alleged contract—no proof of any delivery on Lincoln's part, and no proof that Hinchman ever, in fact, received the securities; in short, no proof sufficient in law to sustain the alleged cause of action.

The case is controlled by the documentary evidence, (chief among which is the receipt,) the legal effect whereof is fatal to Lincoln's claims.

It was for the Court to withhold the facts from the jury when they were not such as could, in law, warrant a finding of delivery, acceptance and receipt.

It would seem that Lincoln's claims in this case

are just such as the statute of frauds was intended to prevent the enforcement of.

Browne on Stat. of frauds, § 321. citing.
Norman *vs.* Phillipps, 14 M. & W., 277.
Stone *vs.* Browning, 68 N. Y., 604.

VI.

Among the authorities cited by the learned counsel are several on points, which it is submitted to not arise in this case but others that seem to require allusion.

In Cusack *vs.* Robinson 1 B & S., 299, the buyer in writing requested the sellers to take back the goods, and failing in that asked them to sell them for him.

There was a non-suit but on appeal the Court (Exchequer Chamber) said that there was sufficient evidence to go to the jury.

Dodsley *vs.* Varley 12 Ad & El. 632, is not in conflict with the proposition that there cannot be a receipt while vendor's lien continues for the Court held in that case that the lien *was gone.*

In Bushell *vs.* Wheeler, 15 Q. B., 442, the defendant bought goods on three months credit and ordered them to be shipped to Bristol where they arrived and were allowed to lay in a warehouse till after the credit expired, when the buyer refused to accept or receive, the Court held that the lapse of time raised a question for the jury. One of the Judges is reported to have said, that for that

reason the case could not be tested by the rule that the vendor must surrender the right of stoppage in transitu.

There seems to have been different conceptions of the decision in that case; it is quoted and partly explained in

Morton *vs.* Tibbett, 15 Q. B., 428.

In the case of Dyer *vs.* Forrest, 2 Abb. Pr., 282, the question was whether the defendant, acting for his son whose name and residence he did not disclose, was individually liable for goods ordered and delivered as directed him—there was proof that the goods were *received* by the defendant's son

Brief of F. A. Sherman for def., p. 283.

The action was one not on contract but on a *quantum valebant.*

It is only another illustration of the same principle which governed Wilcox S. P. Co. *vs.* Green (*supra*).

All of which is respectfully submitted.

THEODORE F. H. MEYER,
WAYNE MacVEAGH,
Of Counsel for Plaintiff in Error.

124-38

Office Supreme Court U. S.
FILED,
NOV 17 1887
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1887. NO. 77.

CHARLES S. HINCHMAN, Plaintiff in Error.

against

RUFUS P. LINCOLN, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR IN REPLY.

AUGUSTUS C. BROWN,
Counsel for Defendant in Error.

Supreme Court of the United States.

CHARLES S. HINCHMAN,
Plaintiff in Error,
and Defendant below.

AGAINST

RUFUS P. LINCOLN,
Defendant in Error,
and Plaintiff below.

Brief for Defendant in Error in Reply.

The Statement of Facts in the Brief of the Plaintiff in Error is faulty and misleading, in that

First.—While on pages 1 and 2 it represents the Stormont Company to have been a creditor of Bothwell, and states that Dr. Lincoln, after obtaining the "Bothwell securities" from Hinchman, consented that their proceeds, after payment of the debt due to Lincoln, should go to the Stormont Company, it omits the facts (very material in view of the argument presented in the Points), that Bothwell had other creditors, *including Hinchman himself* (pp. 15, 65, 81), and that the arrangement which Lincoln assented to was that other companies as well as the Stormont were to have the benefit of any surplus (p. 15).

Second.—On page 2 it is stated that Hinchman "with the assistance of" Cochran and Walter Hinchman "raised money to pay the debt" to Wells, Fargo & Co. The evidence on the subject is found at pages 78 and 80 of the record, and is, we submit, that Hinchman paid Wells, Fargo & Co., with his own money.

Third.—It is stated on page 3 that Hinchman went to New York at the request of the officers and directors of the Hite Company, to consult with them about the claim of the Stormont Company against the Hite Company, and that "then and there occurred the conversation that forms the basis of this controversy." The impression intended to be conveyed is that the transaction between Tyler and Hinchman was part and parcel of the conversation about a settlement between the Stormont and Hite Companies, Hinchman's evidence on the subject is to be found at pages 50 and 51 of the Record, and a perusal of it shows that the transaction between Tyler and Hinchman occurred after the consultation on the subject of the settlement; after Hinchman had left the room where the Hite directors were sitting, and when there could have been no possible connection between the two matters. Indeed, an entirely different scheme by which the Stormont Company was to get its money from the Hite Company, was then under advisement, namely, by the issue and sale of Hite Company bonds (p. 50).

Fourth.—The statement on page 3 that Hinchman on July 20th *supposed that Tyler referred only to the Stormont stock* when he informed Hinchman that "he had delivered the securities to Van Rensselaer," is not warranted by the evidence. Van Rensselaer gave Tyler a receipt on July 8, reciting precisely what "the securities" were (p. 19), and Hinchman says he saw a copy of that receipt "within a week" afterwards (p. 58). *He must therefore have known on July 20th just what had been delivered to Van Rensselaer twelve days before*, and if we refer to Hinchman's letter to Van Rensselaer on page 60, it is perfectly apparent that from the first Hinchman was dealing with *all* the "Bothwell securities," and not merely with the Storment stock which formed a part of them.

Fifth.—Other inaccuracies as to facts will be noticed hereafter.

Reply to Mr. Mac Veagh.

I.–Counsel for the plaintiff in error utterly fails to show that "there was no sufficient proof of the contract declared on to warrant a submission of the case to the jury, and a verdict for the plaintiff."

The presumption being that the trial Court was correct in submitting the case to the jury, we shall not attempt to show affirmatively that it was correct, but shall confine ourselves strictly to a consideration of the errors alleged by the appellant's counsel.

His first proposition is, that the trial judge practically cast the burden of proof as to the *nature of the contract* declared on upon the defendant. He admits that the judge properly charged the jury that the fact that the contract was made was to be proved affirmatively by the plaintiff, but he insists that the judge should have gone further and instructed the jury that the burden was on the plaintiff to show that the contract was with the defendant individually and not as a trustee of the Stormont Company.

Now, as the contract declared on was a contract with the defendant individually, as was clearly stated to the jury by the Court at page 115 of the Record, it is difficult to see why the charge as made did not cover the whole ground, and it will be observed that no exception to this portion of the charge was taken on the trial, and no request made to the judge to change or amplify it. But by way of illustrating his point, counsel quotes another portion of the charge (p. 115), to the effect, that a person dealing in a representative capacity is bound to disclose that fact or be presumed to be acting in his individual capacity, unless the person with whom he is dealing, taking everything into consideration,

knows or ought to know that he is dealing in a representative capacity, in which case the presumption is overthrown, and counsel claims that while this is the proper rule of law in cases where the parties are dealing for the *first time*, it is not the proper rule when one party has "frequently and recently" dealt with another in "a confessed and known representative capacity," as he states was the case here. There are three answers to this claim. First, No exception was taken to the charge quoted and no request was made to alter or extend it. Second, If the defendant had dealt with the plaintiff "frequently and recently" in a "confessed and known representative capacity," then the case was within the exception stated in the charge, for the plaintiff "knew or ought to have known that the defendant was so dealing," and the charge covered the exact state of things as it is claimed to have existed; and, Third, the Judge could not have gone any further than he did without invading the province of the jury, whose right and duty it was to determine whether or not the plaintiff "knew or ought to have known" that defendant was dealing in a representative capacity.

Neither when the plaintiff rested, nor at the close of the whole case, was the testimony such that the Judge could say that there was no evidence that the defendant had dealt with the plaintiff in his individual capacity. It is not true, as stated by counsel on page 8 of his brief, that the defendant, "*as the known representative of the Stormont Company*, had sought to obtain from Lincoln an interest in the proceeds" of the Bothwell securities, or that he "persisted in his negotiation *on behalf of his company* until Tyler agreed to try to persuade Lincoln to make the arrangement," the fact being that prior to May 3d, and while Bothwell was indebted to him individually (pp. 78-80), he individually obtained posses-

sion of the securities which he supposed belonged to Bothwell, by paying off Wells, Fargo & Co.'s lien with his own money (pp. 78, 79), and that then, when he discovered that the securities were Lincoln's and not Bothwell's, and must be given up, he obtained a consent from Lincoln that after payment to himself (Lincoln) of the debt due him, any surplus of the proceeds of the securities should go, not to the Stormont Company, but to that company "*and the other companies who were creditors of Clark & Bothwell*" (pp. 15, 27). In that transaction from the beginning defendant acted for no one but himself, and when defeated in his effort to secure his own debt, he did the next best thing for himself, by getting as much as he could for a company in which he held about one-fifth of the stock (p. 74). Of course he could not ask Lincoln to give him individually the benefit of the surplus, for Lincoln was interested in the Stormont and the other companies to which Bothwell was indebted, and if he was to give away the surplus, he would naturally prefer to give it to those companies rather than to Hinchman.

It is true that Tyler said to Hinchman, "why don't you buy the securities and *get rid of them*," but counsel does not quote the whole of the remark. Tyler said (page 15): "*You are a large loser* by this Stormont Company. Dr. Lincoln will sell out his claim *at a discount*. Why don't you buy the securities and get rid of them." Obviously the idea intended to be conveyed by Tyler, and which was conveyed, was, that Hinchman could get the securities for less than they were worth; could make a profit by selling them again, and could thereby, to some extent at least, make up the losses he had sustained individually. That Hinchman had been a large loser by his purchase of Stormont Stock from Bothwell, is evident from his admissions at page 79, and Lincoln offered to sell for $18,000, securities which

represented $26,500 to him, and which all the parties seemed to consider would sell for more than the latter sum and realize a surplus. There was, therefore, a good reason why Tyler should make just such a proposition to Hinchman, and why Hinchman should entertain it, and in view of the form of the whole proposition, and the reason for it, even without emphasizing the "you" employed by Tyler and the "I" employed by Hinchman, the strained argument of counsel on the words "and get rid of them," is without the slightest merit except as an exhibition of great ingenuity.

It is not true, as stated by counsel on page 9 of his brief, that "it was conceded that Hinchman had previously been negotiating for the securities as a trustee for the Stormont Company," for Mr. Tyler, who had charge of the matter of getting the securities from the defendant for the plaintiff (p. 43), stated emphatically at page 29 that prior to Hinchman's letter of July 22d (p. 17), which was written two weeks after the agreement for purchase, "the intimation that he was dealing as a trustee in the Stormont Company had never been made or suggested." And we may say just here, in passing, that it is difficult to see why this declaration, especially when coupled with the other statements accompanying it on page 29 of the record, to the effect that Hinchman's pretense that he had dealt with Tyler in the capacity of trustee was utterly false and an afterthought, is not a complete denial of the statement of Hinchman at page 55 that at some time, though he did not know when, Tyler had been told by him that he would never act in any other capacity than as a trustee of Stormont affairs, notwithstanding counsel's claim that Tyler had not denied the statement.

Nor is it true, as stated on page 11 of the brief, that defendant had no motive for buying the stock individually. We have already had occasion to re-

fer to his evidence at page 79 of the record, where, notwithstanding his testimony at page 48, that he never had any individual transactions with Bothwell, he admitted that it was a fact that he bought his Stormont stock of Bothwell, and that Bothwell swindled him in selling it to him. Now if we allow these contradictory statements of the defendant to offset each other, there still remains the uncontradicted statement of Tyler at page 15, that defendant was "a large loser by this Stormont Company," and if this was so, and Lincoln offered him securities which were deemed valuable, for $8,500 less than they cost Lincoln, there seems to have been a pretty apparent motive in Hinchman for buying them.

When, therefore, the plaintiff rested his case, there was Tyler's evidence that prior to July 7th, the date of the agreement to purchase, he did not know and had not heard that defendant had acted or had claimed to have acted as trustee of the Stormont Company, and the fact was in that Hinchman had a very good reason for desiring the securities, and the further fact that in the transactions between Tyler and Hinchman, and Lincoln and Hinchman, not only no reference was made to a representative capacity, but the personal form of offer and acceptance was used, and opposed to this the only evidence as to a representative capacity was Hinchman's letter of July 22d, intimating the claim. Surely at that stage of the trial, then, the evidence of "a confessed and known representative capacity" was not so clear as to justify a non-suit.

It may be conceded for the purpose of the argument, that when the defendant went upon the stand, he testified that from the first he acted as a representative of the Stormont Company. He, however, produced no other witness from among the trustees or stockholders of the Company who had ever heard that he had represented the Stormont Company prior

to August 1st, in any efforts to obtain these securities. He did, however, produce a circular (p. 61), signed by him as a member of a committee appointed "to investigate the present financial condition of the Company" (Stormont) dated May 5th, the next day after he had delivered the securities to Tyler (p.14). in which not a word appears touching the Bothwell securities, or his transactions as trustee with reference to them. He also admitted signing a long letter from the trustees to the stockholders of the Stormont Company (p. 92), dated July 1st, in which the indebtedness of Clark and Bothwell to the Company is referred to, but no mention made of defendant's having had anything to do with any securities belonging to either member of that firm. The minutes of the trustees' meeting of August 1st, which the defendant put in evidence (p. 87), and which were drawn after the trouble between the parties and while Hinchman was trying to bolster up his claim of a representative capacity, added nothing to the strength of his case, since they were mere declarations of his own after the fact, and a repetition by himself of what he had sworn to on the trial.

In rebuttal, a co-trustee of the Stormont Company, who signed the circular and the letter above referred to, and who had attended all but one of the meetings of the trustees held between May 3d and July 23d (p. 109), testified that he never heard the defendant, or any one else, state that the defendant had purchased or held, or talked of so doing, any stock for the Stormont Company until after the controversy between the plaintiff and defendant began.

When the evidence was closed, therefore, there was, to say the least of it, a conflict of evidence on the question of the capacity in which the defendant had acted in whatever he had done in relation to these securities. The evidence of Tyler and Lincoln was upon the one side, corroborated by a co-trustee

of the defendant and by the inferences legitimately to be drawn from the silence of the defendant in the circular and letter and at the trustees' meeting; his motive for purchasing, and the other facts in the case. The evidence of the defendant alone was upon the other side, weakened by his hesitating mode of testifying; his apparent lack of candor (pp. 78, 79, 80,) and his frequent contradictions of himself—notably his declaration that he had had no transactions with Bothwell (p. 48), and then his admission that he had had transactions with him in which he was swindled (p. 79), and his statement that he saw a copy of the Van Rensselaer receipt within a week after July 8th (pp. 58-67), and after learning that Van Rensselaer did not have the copy until September 15th, his admission that he couldn't say when he saw it (pp. 21-69). Under these circumstances the Court could do nothing else but leave it to the jury to determine, on the evidence, in what capacity the defendant had acted, and if it found that he had acted as a representative, whether he had disclosed that fact or was relieved from disclosing it by the plaintiff's previous knowledge of it.

II.—Counsel for the plaintiff in error utterly fails to show that "there was no sufficient proof of acceptance and receipt of the securities under the contract declared on to warrant a submission of the case to the jury, and verdict for the plaintiff."

His first proposition is, that though the Court properly instructed the jury that the plaintiff was bound to show receipt and acceptance, it erred in leaving it to the jury to infer acceptance and receipt from insufficient evidence. He does not present on page 13 of his brief all the facts in evidence from which plaintiff claimed, and the jury found, that the infer-

ence was to be drawn. There was not only the Van Rensselaer receipt; the interview between Tyler and Hinchman on July 20th, when Hinchman said that the delivery to Van Rensselaer was "all right," and the correspondence between the parties, which counsel mentions, but there was also evidence tending to show that Hinchman saw the receipt within a week after it was given (p. 58), and did not object to it (p. 21); that on August 1st, at Long Branch, after he had seen the receipt, he admitted that he had the securities (pp. 43–45), and that on August 24th he again evidenced his dominion over them by directing Van Rensselaer not to surrender them to Lincoln (pp. 46–60). There was no dispute about any of these facts except the admission at Long Branch, and it was for the jury to say as to that, whether Lincoln on the one side or Hinchman and Meyer on the other told the truth, and these facts being established, and the further fact that the defendant had been dealing as an individual and not as a trustee being found, as it was found, we submit that the inference of acceptance and receipt was justified.

The fundamental error of counsel in both the briefs submitted, is in supposing that the Van Rensselaer receipt was put in evidence to show, conclusively, in and of itself, a delivery to and acceptance by Hinchman, and in assuming that the evidence of Hinchman, and his letters written after he began his efforts to get rid of his contract and yet hold on to the subject matter of it, must necessarily be taken as stating the truth. The fact that the twelve men in the jury box who saw him on the stand and heard his evidence did not believe a word of it, proves the fallacy of the second assumption, and a more careful perusal of the Record would have prevented the first.

That receipt was put in evidence not as conclusive of a delivery to Hinchman, but as a fact to be taken

into consideration, after the jury had determined the question of defendant's capacity, in connection with his admission that he had given Van Rensselaer some authority in the premises (p. 18); his admission to Tyler after he saw the receipt that the delivery to Van Rensselaer was "all right," (pp. 58–23), his admission at Long Branch that he had the securities (pp. 43–45), and his direction to Van Rensselaer on August 24th, not to surrender any of the securities (p. 46). If the jury should find, as it actually did find, that Hinchman was acting in his individual capacity, and that his claim of a representative capacity, first intimated in his letter of July 22d (p. 17), was an afterthought and false, then the authority given by him to Van Rensselaer was not the limited authority he said it was, and in view of the admission to Tyler that the delivery was "all right," the admission at Long Branch of possession, and the subsequent assertion of dominion over the securities, it was a fair inference for the jury that Van Rensselaer's authority was a general one to receive the securities for Hinchman. If the jury should so find, then, under the terms of the receipt, the delivery to Van Rensselaer was a delivery to Hinchman and an acceptance by him sufficient to satisfy the Statute, for nothing remained but for him to pay the purchase price.

Brown on Stat. of Frauds (4th Ed.) sec. 317a.

But there is still another ground upon which the receipt was admissible. Even if in the first instance Lincoln made Van Rensselaer his own agent to hold the securities until Hinchman should pay the money, and did not intend that Hinchman should get them until he had paid, yet if Hinchman got them into his possession, as there was testimony to show that he did by his admission on August 1st, Lincoln, with knowledge of the fact, had a right to accept and approve

the previously unauthorized delivery by his agent, as he did through his counsel in the letter of August 3d (p. 31), and he was entitled to show the Court and jury every fact bearing on this approved delivery.

The fact that Lincoln afterwards and in November, demanded of Van Rensselaer a return of the securities (p. 38), is immaterial on the question of acceptance and receipt. The securities were then in the possession or under the control of Hinchman. The acceptance and receipt had been accomplished, and could not be nullified by either party. Suppose no Van Rensselaer had intervened, but that the delivery of July 8th had been direct to Hinchman and he had personally received the securities no one will claim that such a demand on him after he had refused to pay, would in any way have affected the question whether he had previously accepted and received. All this demand amounted to was the expression by Lincoln of his desire to get back securities which Hinchman said he had got and which he had refused to pay for, but it brought out from Hinchman a new declaration of dominion and control (p. 60), which the jury has said was an individual control.

Thus much on the question of the admissibility of the receipt in evidence, and in answer to the proposition in both the briefs submitted that the Court erred in admitting it.

The next question is, whether on all the facts presented there was sufficient proof of receipt and acceptance by the defendant, and on that point we respectfully refer the Court to the original brief of the Defendant in Error, at page 12 *et seq.*

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